FILED
APR 2 1971
E. ROBERT SEAVER, CLERK

In The

Supreme Court of the United States

October Term, 1970

No. 1537

ALAN D. EISENBERG and
SYDNEY M. EISENBERG,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RICHARD L. CATES
JOHN H. BOWERS
BRUCE F. EHLKE
LAWTON & CATES
110 East Main Street
Madison, Wisconsin
Attorneys for Petitioners

The Gilman Press, Inc., Madison, Wisconsin

INDEX TO APPENDIX

PAGE
COMPLAINT 5

ORDER TO ANSWER 12

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE 13

ORDER [denying application for order to show cause] .. 14

MOTION TO STRIKE, DEMURRER AND MOTION TO DISMISS COMPLAINT 15

ORDER [denying motion to strike, etc.] 27

ANSWER [of Alan David Eisenberg] 28

ANSWER [of Sydney M. Eisenberg] 34

ORDER [appointing trial referee] 41

NOTICE OF TRIAL 41

MOTION FOR CHANGE IN APPOINTMENT OF REFEREE ON GROUNDS OF PREJUDICE 42

ORDER [denying motion for change of referee] 45

NOTICE OF TIME AND PLACE OF TRIAL 45

MOTION FOR DISCOVERY, CHANGE IN REFEREE AND FOR OPPORTUNITY TO PREPARE DEFENSE; MOTION TO DOCKET, SET BRIEFING SCHEDULES AND FOR ORAL ARGUMENT REGARDING THE LEGAL QUESTIONS RAISED BY THE PLEADINGS IN THE ABOVE MATTER AND

PAGE

TO ENJOIN REFEREE FROM PROCEEDING TO HEARING UPON THE FACTUAL ISSUES PENDING THE DECISION OF THIS COURT ON THE LEGAL QUESTIONS 46

MOTION FOR SEPARATE TRIAL BY ALAN DAVID EISENBERG and MOTION FOR SEPARATE TRIAL BY SYDNEY M. EISENBERG 58

ORDER [regarding oral argument] 83

ORDER [changing referee and denying other motions] 83

MOTION FOR CONTINUANCE OF HEARING AND TO RECONSIDER DEFENDANTS' CONSTITUTIONAL DEFENSE 85

AFFIDAVIT IN OPPOSITION TO MOTION FOR CONTINUANCE 90

ORDER [denying motion for continuance, etc.] 94

AFFIDAVIT [of State] 95

ORDER TO SHOW CAUSE 99

DECISION AND FINDINGS OF TRIAL REFEREE 100

ORDER [approved by trial referee] 104

AFFIDAVIT [of defense] 105

ORDER [denying consideration of questions certified by trial referee] 109

PAGE

MOTION TO OPEN THE RECORD TO TAKE NEWLY DISCOVERED EVIDENCE 110

FINDINGS, REPORT AND RECOMMENDATION OF REFEREE GEORGE H. YOUNG 119

MOTION [to dismiss complaints] 156

MOTION [for judgment against defendants] 157

MOTION TO DISMISS COMPLAINT AND FOR ORAL ARGUMENT 158

ORDER [regarding briefing] 163

ORDER [denying motion to dismiss] 164

MOTION TO STRIKE, OR IN THE ALTERNATIVE, TO PERMIT PLAINTIFF TO FILE SUPPLEMENTAL AFFIDAVITS AS A PART OF PLAINTIFF'S APPENDIX 165

MOTION FOR EXTENSION OF TIME 184

STIPLATION FOR EXTENDING DEFENDANTS' TIME TO ANSWER 184

RESPONSE TO THE MOTION OF THE STATE TO STRIKE DEFENDANTS' APPENDIX AND TO ACCEPT THE STATE'S AFFIDAVITS IN SUPPORT THEREOF, AND MOTION 185

UNTITLED PLEADING [of defense] 187

AFFIDAVIT [of State] 195

PAGE

DECISION OF WISCONSIN SUPREME COURT 204

MOTION FOR STAY 224

ORDER [denying motion for stay] 225

MOTION FOR REHEARING 226

MOTION FOR STAY OF MANDATE PENDING DETERMINATION OF MOTION FOR REHEARING .. 229

ORDER [denying motion for stay] 228

MOTION TO RECEIVE EVIDENCE 229

ORDER [denying motion to receive evidence] 230

ORDER [denying motion for rehearing] 231

MOTION FOR STAY PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI 232

ORDER [denying motion for stay] 235

MOTION FOR CLARIFICATION OF MANDATE 236

[Documents regarding service of pleadings are not listed in the above index nor printed in the appendix herein.]

DECISION OF UNITED STATES DISTRICT COURT 244

COMPLAINT [—formal parts omitted.]

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT:

The Complaint of the Board of State Bar Commissioners of the State of Wisconsin respectfully shows to the Court and Alleges:

That your petitioners and plaintiffs, W. WADE BOARDMAN, GEORGE P. ETTENHEIM, CLARENCE E. FUGINA, JOHN P. McGALLOWAY, and THERON P. PRAY, are members of, and constitute, the Board of State Bar Commissioners of the State of Wisconsin, duly appointed, qualified and now acting as such;

That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, are attorneys at law, licensed to practice in the Supreme Court of the State of Wisconsin, and other courts of this state, and are now, and were at the times herein mentioned, residents of Milwaukee County, Wisconsin.

That Alan David Eisenberg was admitted to practice on the 6th day of June, 1966.

That Sydney M. Eisenberg was admitted to practice on the 12th day of June, 1939.

It is further alleged on information and belief as follows:

COUNT I

That the defendants, ALAN DAVID EISENBERG and SYDNEY M. EISENBERG, were guilty of conduct which was unprofessional and such as would serve to bring the Courts of Justice of this state into disrepute and contempt and which was contrary to defendants' duty as licensed attorneys and to the attorney's oath which they took when they were admitted to practice and as set forth at Sec. 256.29 Wisconsin Statutes and which oath provides in part as follows:

> "I do solemnly swear:
>
> * * *
>
> "I will maintain the respect due to the Courts of Justice and Judicial Officers;"

That defendants' conduct consisted of the following:

(a) That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, both individually and by concerted action, pursued a course of vindictive and reckless harassment and psychological persecution against Hon. John E. Krueger, County Judge of Milwaukee County, Wisconsin; that incident to said conduct, they caused to be publicly circulated statements which they knew, or should have known, would reach Judge Krueger to the effect that said Judge was guilty of conduct for which a criminal warrant could be issued; that he would resign from the bench for personal reasons within 60 to 90 days or such warrant would be issued; and that said statements followed a series of advertisements in which defendants had participated, as alleged at Paragraph (b) hereof; that defendants' conduct was of such aggravated nature as to cause Judge Krueger great mental suffering and anguish, which culminated in his death by his own hand on the 28th day of August, 1968.

(b) That the defendants participated in causing the following advertisement to be run in The Milwaukee Journal and The Milwaukee Sentinel, from April 20, 1968, through April 26, 1968, and again from April 29, 1968, through May 5, 1968:

> "All Persons With Complaints Against Judge John E. Krueger Write: Citizens' Committee for a more Dignified Traffic Court Judiciary, Greg Maxaculi, 728 Madison ave., South Milwaukee, Wisconsin 53172"

And the following advertisement to be run in The Milwaukee Sentinel and The Milwaukee Journal from May 14, 1968, through May 27, 1968, and in The Milwaukee Journal on June 11, 1968:

> "All Complaints against Judge John E. Krueger write: Citizens' Committee, Greg Maxiculi, 728 Madison ave., South Milwaukee, Wis."

(c) That the course of conduct as alleged at Paragraph (a) hereof reached a point that Judge Krueger in desperation appealed to a friend for help; that the friend thereupon became an emissary to appeal to defendants that they desist from their activities; that said emissary was told by defendant, Sydney M. Eisenberg that, "We have so much on him that we are really going to chop him up"; that in the negotiations that followed the emissary was told by Sydney M. Eisenberg: "He's (Judge Krueger) going to have to agree to what Alan and I decide"; that in subsequent negotiations between defendants and said emissary a first draft of a press release was dictated by the defendant, Sydney M. Eisenberg, which became, after certain revisions, the press release as read by Judge Krueger and which is attached hereto and incorporated herein and identified as "Exhibit A";

(d) That in advance of the issuance and reading of the press release (Exhibit A), defendant, Alan David Eisenberg, did on Sunday night, August 25, 1968, and Monday morning, August 26, 1968, disseminate copies of "Exhibit A" to several persons and boastfully read the same aloud in public and stated that if Judge Krueger did not read it Monday morning, he would be off the bench within 60 to 90 days and suggested to several persons that they be present in Judge Krueger's Court to witness the issuance of the press release.

(e) That by the course of the conduct alleged as Paragraphs (a), (b), (c), and (d) Judge John E. Krueger was forced by defendants to humiliate himself and the Court by issuing "Exhibit A" on August 26, 1968, and reading the same in open Court; that said press release and the ceremony at its issuance were designed to humiliate Judge Krueger, to aggrandize defendants, Alan David Eisenberg and Sydney M. Eisenberg, and to demonstrate publicly defendants successful subjugation of Judge Krueger.

WHEREFORE, plaintiffs pray that said ALAN DAVID EISENBERG and SYDNEY M. EISENBERG be ordered to make answer to this Complaint and if upon the trial of the issues they, individually or severally, be found guilty of the matters herein charged, that they, individually, be properly disciplined therefor by the judgment of this Court, and that such order and relief be granted in the premises as to the Court may seem just and proper.

/s/ Rudolph P. Regez
Rudolph P. Regez
Counsel for the Board of State Bar Commissioners

/s/ W. Wade Boardman
W. Wade Boardman

/s/ John P. McGalloway
John P. McGalloway

/s/ Clarence E. Fugina
Clarence E. Fugina

/s/ Theron P. Pray
Theron P. Pray

/s/ George P. Ettenheim
George P. Ettenheim

BOARD OF STATE BAR COMMISSIONERS FOR THE STATE OF WISCONSIN

[Subscribed and sworn to by W. Wade Boardman on September 28, 1968, by John P. McGalloway on September 25, 1968, by Clarence E. Fugina on September 23, 1968, by Theron P. Pray on September 24, 1968, and by George P. Ettenheim on September 26, 1968.]

"EXHIBIT A"

PRESS RELEASE

The work load in my Traffic Court has increased tremendously. I have had conferences with the State Court

Administrator to attempt to solve the problems that exist at present and will become more acute in the future. Last Spring the Wisconsin Supreme Court sent me to attend a Seminar in Chicago, Illinois, where for one week the discussions centered on the future operation of traffic courts as provided in the Federal Highway Transportation Act. Therefore, I have a tremendously important announcement to make which I believe should be made publicly to the Milwaukee County community for the good of the entire community.

I want it to be publicly known that I have requested Attorney Edward R. Cameron of the Law Firm of Peregrine, Schimenz, Marcuvitz & Cameron, Attorney Sydney M. Eisenberg and Attorney Alan D. Eisenberg of the Law Firm of Eisenberg, Kletzke & Eisenberg, to act as an advisory committee to assist me in concluding changes which are necessary to bring my Traffic Court in line with the ideals of justice and understanding with the people of Milwaukee County, as well as with the esteemed members of the Milwaukee Bar.

I have selected Attorneys Edward R. Cameron, Sydney M. Eisenberg, and Alan D. Eisenberg because these lawyers have a great volume of work in the Traffic Court and are respected by the Bar and the people of our community. These lawyers have always been known to practice law ethically, fairly, honestly and industriously.

The tremendous increase in my Traffic Court and the anticipated increase next year when the full effect of the Uniform Traffic Code will be felt, as well as the increases in litigation which have confronted the other two Misdemeanor Courts have led the three Judges to an impossible situation where we have been confronted with tremendous case loads and where it has been increasingly difficult for us to provide adequate time which is necessary so that the rights of every defendant can be fully adjudicated.

In my discussions with the Eisenbergs and other prominent members of our Bar, I have concluded that the time has come when immediate affirmative steps must be taken to provide the necessary time for the proper presentation of cases, both by the prosecution and the defense. The Eisenbergs, who have a large volume of work in these courts, have forcefully called to my attention that the Traffic Court is probably the first encounter which the average citizen has with the workings of a Court. It is their impression at the time they first enter Traffic Court, which creates their understanding of our court system and democracy at work through the administration of justice and which must frequently last throughout their lives.

I am anticipating the presentation of a program which will lead to better cooperation with the members of the Bar, my brother Judges, and the entire community.

I am proud that bigotry has never crept into our court system and I know it never will. I have watched the Eisenbergs practice the "Golden Rule", as well as other members of the Bar in our community and I can truthfully say that I am proud of the entire Milwaukee Bar.

I sincerely promise that I will take every possible step to implement the goals described and work closely with my committee and the Bar Association to that end.

/s/ JUDGE KRUEGER

* * *

ORDER TO ANSWER [—formal parts omitted.]

Upon complaint made and filed pursuant to Section 256.28 (8) of the Wisconsin Statutes asking for disciplinary action against the above-named defendants, attorneys of this state,

IT IS ORDERED that the said defendants, Alan David Eisenberg and Sydney M. Eisenberg, be and they are hereby required to appear and answer or demur to the complaint herein within twenty days after the service upon them of copies of said complaint and of this order, and to file their pleadings or motions in the office of the Clerk of the Supreme Court within ten days after the time limited to plead.

Dated this 2nd day of October, 1968.

BY THE COURT:

/s/ FRANKLIN W. CLARKE
Franklin W. Clarke
Clerk

* * *

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

[—formal parts omitted.]

Sydney M. Eisenberg, being first duly sworn on oath deposes and says as follows:

1. That he is one of the above defendants and makes this affidavit in behalf of himself and his co-defendant herein, Alan D. Eisenberg; that in order to responsively plead to, defend against or make appropriate motions with respect to the allegations of the complaint herein on the part of either or both of the defendants, it is necessary to have available to your affiant and his co-defendant a full and complete record of all proceedings herein including a full transcript of the testimony and the evidence produced during the investigation or investigations preliminary to the issuance of the complaint herein; and for such purposes it is also necessary that your affiant and his co-defendant be able to subpoena witnesses before proper officers of any proper county in the taking of depositions in behalf of your affiant and his co-defendant in the above matter.

2. That neither of the defendants has sufficient knowledge or information of all the facts and circumstances which are the basis for the issuance of the complaint herein and it is necessary that the defendants and each of them do have such knowledge and information in order to make proper motions and other responsive pleadings in the within action.

That this affidavit is made for the purpose of supporting the order to show cause herein.

Dated in Milwaukee, Wisconsin this 8th day of October, 1968.

/s/ Sydney M. Eisenberg
Sydney M. Eisenberg

[Subscribed and sworn to by Sydney M. Eisenberg on October 8, 1968.]

* * *

[ORDER.]

Madison, October 9, 1968

To Mr. Rudolph P. Regez
Attorney at Law
1502 Tenth Street
Monroe, Wisconsin 53566

Kersten and McKinnon
Attorneys at Law
231 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Sir:—The Court today announced decision in your case as follows:

State of Wisconsin v. Alan David Eisenberg and Sydney M. Eisenberg, St. #107.

ORDERED that the application for an order to show cause be and the same is hereby denied on the grounds that this action is a disciplinary proceeding and, in the alternative, that the petition does not state adequate grounds for discovery.

Respectfully yours,

Franklin W. Clarke
Clerk of Supreme Court

* * *

MOTION TO STRIKE, DEMURRER AND MOTION TO DISMISS COMPLAINT [—formal parts omitted.]

MOTION TO STRIKE

NOW COMES the defendants Alan David Eisenberg and Sydney M. Eisenberg, individually and by their attorneys, Lawton & Cates, and move the court to strike matters from the complaint as follows:

1. Moves to strike from paragraph (a) of the complaint the following portions:

> "That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, both individually and by concerted action, pursued a course of vindictive and reckless harassment and psychological persecution against Hon. John E. Krueger, County Judge of Milwaukee County, Wisconsin;"

and further:

> ". . . that defendants' conduct was of such aggravated nature as to cause Judge Krueger great mental suffering and anguish, which culminated in his death by his own hand on the 28th day of August, 1968."

for the following reasons:

(a) These allegations are irrelevant to the charge that defendants failed to maintain the respect due to the courts of justice and judicial officers, and

(b) That to litigate all the matters which of necessity must be tried to substantiate the irrelevant allegations complained of in paragraph (a) of the complaint would: seriously and irreparably prejudice the defendants' ability to defend against the charge that they were guilty of failing to maintain the respect due to the courts of justice and judicial officers; cause the charges against defendants to become confused; and constitute a denial of a fair hearing in violation of the due process clause of the 14th Amendment to the United States Constitution.

(c) To require defendants to defend against the allegations complained of in paragraph (a) of the complaint in a case wherein they are charged with failing to maintain the respect due courts of justice and judicial officers would constitute a taking of property in violation of the due process clause of both the 14th Amendment to the United States Constitution and of Article I, Sections 1, 13 and 22 of the Wisconsin Constitution in that if defendants were to prevail completely on the charge of disrespect their reputations would be so damaged and destroyed by having to litigate the irrelevant matters complained of in paragraph (a) they would be irreparably harmed for life; and to require them to prepare for and engage in a trial of issues contained in the allegations complained of when the charge against them was disrespect would unreasonably cause them loss of their financial resources to litigate irrelevant issues.

2. Moves to strike the remaining allegations of paragraph (a) of the complaint because the conduct described therein is protected speech activity and any prosecution against defendants for this activity is in violation of rights secured and guaranteed under the 1st and 14th Amendments to the United States Constitution and of Article I, Section 3, of the Wisconsin Constitution.

3. Moves to strike paragraph (b) of the complaint because the conduct described therein is protected speech activity and any prosecution against defendants for this activity is in violation of rights secured and guaranteed under the 1st and 14th Amendments to the United States Constitution and of Article I, Section 3, of the Wisconsin Constitution.

4. Moves to strike paragraph (c) of the complaint because:

(a) The conduct described therein is protected speech activity and any prosecution against defendants for this activity is in violation of rights secured and guaranteed under the 1st and 14th Amendments to the United States Constitution and of Article I, Section 3, of the Wisconsin Constitution.

(b) The allegations incorporate paragraph (a) of the complaint and are dependent on paragraph (a) of the complaint which should be stricken for the reasons stated in paragraph 1 above, of this motion.

5. Moves to strike paragraph (d) of the complaint because the conduct described therein is protected speech

activity and any prosecution against defendants for this activity is in violation of rights secured and guaranteed under the 1st and 14th Amendments to the United States Constitution and of Article I, Section 3, of the Wisconsin Constitution.

6. Moves to strike paragraph (e) of the complaint because the conclusions contained in paragraph (e) of the complaint are dependent on the allegations contained in paragraphs (a) (b) (c) and (d) which are incorporated and which should be stricken for the reasons stated in paragraphs 1, 2, 3, 4 and 5 above of this motion.

DEMURRER AND MOTION TO DISMISS COMPLAINT

Irrespective of any relief which may be granted or denied by reason of the foregoing motions to strike, defendants individually and by their attorneys Lawton & Cates, demur to the complaint and move for dismissal of the action against them on the basis that the complaint does not state a cause of action for discipline.

/s/ LAWTON & CATES
Lawton & Cates

AFFIDAVIT [—formal parts omitted.]

ALAN DAVID EISENBERG, being first duly sworn on oath deposes and says:

1. That he is one of the defendants in this action.

2. On or about April 14, 1968, Gregorio Maxaculi contacted your affiant concerning remarks Judge Krueger had reportedly made from the bench wherein he questioned one of our associates as to whether he was still working for the Jew on 11st Street.

3. Mr. Maxaculi indicated that he had had concern in the past as to Judge Krueger's prejudice toward minority groups.

4. Mr. Maxaculi advised your affiant that he was interested in removing Judge Krueger from the bench if possible by recall procedure and impeachment; Mr. Maxaculi believed that he would have to marshall complaints and evidence of other acts of bigotry and therefore requested that an advertisement be placed in the paper requesting persons who might have complaints against Judge Krueger to contact him.

5. That thereafter on behalf of Mr. Maxaculi your affiant contacted the Journal Co., the publisher of the Milwaukee Journal and Sentinel newspapers to see if such an advertisement could be placed.

6. That after approximately ten days, your affiant was advised by telephone that an advertisement as contained in paragraph (b) of the complaint in this matter had been

approved by the editorial board of the company as well as by the attorneys for the newspaper companies.

7. That your affiant was acting as the attorney and agent for Mr. Maxaculi who had assumed full responsibility in writing for the advertisements.

/s/ Alan David Eisenberg
Alan David Eisenberg

[Subscribed and sworn to by Alan David Eisenberg on November 9, 1968.]

AFFIDAVIT [—formal parts omitted.]

GREGÒRIO MAXACULI, being first duly sworn, on oath deposes and says:

1. He is a resident of Milwaukee County and lives at 728 Madison Avenue, South Milwaukee, Wisconsin and is the nephew and closest living relative to the Patriarch of the Eastern Orthodox Church who resides at the Patrican at Istanbul, Turkey. That affiant has among other duties devoted a great portion of his life in church laywork to foster brotherhood among men everywhere and effectively strive toward the elimination of bigotry and injustice everywhere.

2. That affiant, his family and friends have diligently and effectively worked in both political and civil areas to make their contribution toward the improvement of social conditions in the United States, Europe and the Middle East. During World War II, your affiant worked with Greek Intelligence in conjunction with the American In-

telligence to further the American cause of democracy in the Middle East and Europe and made many missions at the risk of his life to accomplish the end of tyranny and dictatorship.

3. That affiant became interested in the attitude of Milwaukee's Judge John E. Krueger toward minority people during the last several years and ultimately decided that a committee should be formed, which included his son, himself and others of his countrymen and family, to take steps to further the recall of Judge Krueger by the legislature or through some other legal recall movement, as provided for by the Constitution of the State of Wisconsin.

4. That as part of his attempt to recall Judge Krueger he placed certain advertisements in the Milwaukee newspapers.

5. Affiant states that he has examined paragraph lettered (b) of the complaint by the State of Wisconsin pending in this court against Alan David Eisenberg and Sydney M. Eisenberg and that he personally caused these advertisements to be placed in the Milwaukee Journal and/or the Sentinel requesting complaints against Judge Krueger to be sent to his home; your affiant assumed the obligation to pay for all of the ads which were inserted in the newspaper as aforementioned; these ads were not run by the Eisenbergs but by affiant as aforementioned; that the bills for these ads were sent to your affiant's home; and that your affiant has paid for these advertisements.

/s/ GREGORIO MAXACULI
Gregorio Maxaculi

[Subscribed and sworn to by Gregorio Maxaculi on November 8, 1968.]

AFFIDAVIT IN SUPPORT OF MOTION TO STRIKE
[—formal parts omitted.]

RICHARD L. CATES, being first duly sworn on oath deposes and says:

1. That he is one of the attorneys representing the defendants, Alan David Eisenberg and Sydney M. Eisenberg and makes this affidavit to support defendants' motion to strike paragraph (a) of the plaintiff's complaint as well as paragraphs (c) and (e), which are dependent on paragraph (a).

2. It is your affiant's understanding that the complaint in this case charges the defendants with failing to maintain the respect due to courts of justice and judicial officers.

3. This affidavit is made to support the contention that the conclusions alleged in paragraph (a) of the complaint which states:

> "That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, both individually and by concerted action, pursued a course of vindictive and reckless harassment and psychological persecution against Hon. John E. Krueger, County Judge of Milwaukee County, Wisconsin;"

and further:

> ". . . that defendants' conduct was of such aggravated nature as to cause Judge Krueger great mental suffer-

ing and anguish, which culminated in his death by his own hand on the 28th day of August, 1968."

are irrelevant to the charge that defendants failed to maintain respect due courts of justice and judicial officers.

4. In litigating the truth or falsity of these allegations of plaintiff's complaint it would be necessary and essential for the proof to establish the mental and physical condition of Judge Krueger as well as the effect upon the mental and physical condition of Judge Krueger which all the various pressure to which he was subject at and immediately prior to his death, may have had upon him; that all these matters of proof are irrelevant to the charge in the complaint that defendants failed to maintain the respect due to our courts of justice and our judicial officers.

5. That affiant has made an investigation into some of these questions and has attached to this affidavit as Ex. A, a substantial number of newspaper articles containing evidence relevant to Judge Krueger's past mental and physical stability; that in addition affiant has attached as Exs. B and C, two newspaper articles written after the death of Judge Krueger as well as the report of Judge John Decker (Ex. D), who conducted a John Doe investigation, all of which refer to evidence showing Judge Krueger's mental and physical condition at and immediately prior to his death and which, as well, show what various pressures Judge Krueger was subject to at that time.

6. From these articles it appears obvious that to permit the allegations of paragraph (a) of the complaint to be tried in an action against defendants for disrespect would tend to seriously confuse the issues; very substantially

prejudice the defendants' ability to be fairly tried; and would require an undue consumption of time.

7. Finally, to require defendants to defend against this allegation in a case wherein they are charged with disrespect would be a violation of the due process clauses of the 14th Amendment to the Constitution of the United States and to Sections 1, 13 and 22 of Article I of the Wisconsin Constitution, for even if they were to completely prevail, their reputations would be so injured by being required to defend against these allegations that they would be irreparably harmed for life and further the time and expense necessarily required to prepare and defend them against these allegations in a case wherein defendants were charged with disrespect would constitute a deprivation of property without due process of law.

/s/ RICHARD L. CATES
Richard L. Cates

[Subscribed and sworn to by Richard L. Cates on November 14, 1968.]

[Exhibits A through C, copies of newspaper clippings attached to the affidavit of Richard L. Cates, are not printed.]

EXHIBIT D

[Report on Joe Doe investigation—formal parts omitted.]

Shortly after noontime Wednesday, August 28, 1968, District Attorney David J. Cannon presented a citizen at my chambers. The citizen orally requested a Joe Doe investigation into the events surrounding the shooting of the

Honorable John E. Krueger, County Judge, which had occurred less than three hours earlier.

The proceeding was carried on informally into the early hours of the next day and culminated in a written request by the citizen for the investigation which was filed at 10:38 a.m. Thursday, August 29, 1968.

The reception of testimony commenced immediately. Not until newsmen were subpoenaed that afternoon did the existence of the proceeding become known. It has continued at varying hours of the day and night until this time.

A grand jury by statute may report its progress.[1] Although the John Doe statute does not so provide, there seems to be no logical reason why a John Doe magistrate may not do the same, for a grand jury and a John Doe proceeding are similar investigative tools.[2] However, it has been expressly ruled by the Wisconsin Supreme Court that a grand jury[3] or a Joe Doe[4] magistrate may not reveal the testimony, may not summarize it and may not file a report characterizing the conduct of living persons who may be subject to disciplinary procedures.[5] Thus, this report must walk the tightrope of the "public's right to know" without falling into the abyss of prohibited disclosure.

The difficulty with a Joe Doe proceeding in the present instance is that it is a secret investigation by a fellow judge with the public unable to test the conclusions by examining the evidence. I believe I have minimized that difficulty by not requiring the maintenance of secrecy by the witnesses many of whom were newsmen.

---

[1] 255.17 Stats.
[2] State ex rel. Schulter v. Roraff (1968) 39 Wis. 2d 342.
[3] Williams v. Journal Co. (1933) 211 Wis. 362; Report of Grand Jury (1931) 204 Wis. 409.
[4] State ex rel. Niedziejko v. Coffey (1964) 22 Wis. 2d 392.
[5] Note 3, supra.

By law[6] the purpose of a Milwaukee John Doe proceeding is to determine whether a crime has been committed that can be prosecuted in the Milwaukee courts. Generally, a crime is professional misconduct, but professional misconduct is not necessarily a crime. Non-criminal professional misconduct cannot be prosecuted in Milwaukee courts.[7]

In this proceeding the evidence produced does not establish the commission of a provable crime, nor does it disclose significant events other than those widely reported in the news media.

The late Judge Krueger's personal indiscretion, which is known to newsmen, was unquestionably brought about by the pressures of overwork. It is of such a nature that only a man of the high principals who was emotionally distraught could have made so severe a judgment of himself with such a tragic result.

There is no evidence of unlawful administration of justice by Judge Krueger, nor is there any evidence that the indiscretion in any way affected the administration of justice in his court.

District Attorney Cannon agrees that there is no justification for extending this procedure. However, he will continue his investigation to guard against the chance that all circumstances have not come to light.

---

[6] 954.025 Stats.
[7] 256.28 Stats.

This proceeding is concluded.

* * *

[ORDER.]

Madison, December 4, 1968

To Mr. Rudolph P. Regez
Attorney at Law
1502 Tenth Street
Monroe, Wisconsin 53566

Mr. Richard L. Cates
Attorney at Law
Lawton & Cates
Tenney Building
Madison, Wisconsin 53703

Sir:—The Court today announced decision in your case as follows:

State of Wisconsin v. Alan David Eisenberg and Sydney M. Eisenberg, St. #107.

Defendants Alan David Eisenberg and Sydney M. Eisenberg, individually and by their attorneys, Lawton and Cates, having served on the plaintiff herein and having filed their "motion to strike, demurrer and motion to dismiss complaint," the said defendants and plaintiff having served and filed briefs on said pleadings, and the court being fully advised,

IT IS ORDERED that the demurrer is overruled with prejudice; the motion to dismiss and the motion to strike are dismissed without prejudice and the defendants are ordered to answer the complaint herein within ten days of the date of this order.

Respectfully yours,

Franklin W. Clarke
Clerk of Supreme Court

* * *

ANSWER [—formal parts omitted.]

Comes now the defendant, Alan David Eisenberg, in the above entitled matter, and for his answer to the complaint herein respectfully alleges and shows to the court as follows:

FIRST DEFENSE

1. Answering unnumbered paragraph first of the complaint herein, under "Count I", defendant submits that it contains principally conclusions of law which defendant is not required to answer. If answer is required, defendant admits that he took the attorney's oath as prescribed by Section 256.29, Wis. Stats., and denies each and every other allegation of said unnumbered paragraph immediately preceding paragraph (a).

2. Answering paragraph (a) of the complaint herein, admits that he made the statement, in response to a reporter's question, not in any courtroom but in private conversation, that "I wouldn't be surprised if he was off the bench in the next two or three months for reasons that

anybody can see; that you know about, that everybody knows about"; that one Gregorio Maxiculi [*sic*] came to defendant's office seeking legal advice about running the ads set forth in paragraph (b) of the complaint; that defendant sought the advice of the Milwaukee Journal concerning said ads and that defendant was advised by the Journal, and in turn advised Maxiculi [*sic*], that the ads had the approval of the Milwaukee Journal Editorial Board and a legal opinion that the Journal was relying upon.

Further answering paragraph (a) of the complaint, defendant denies each and every other allegation of paragraph (a) of the complaint.

3. Answering paragraph (b) of the complaint, defendant admits he provided legal counsel to one Maxiculi [*sic*], who ran the ads set forth in paragraph (b) as described in paragraph (2) herein, and denies each and every other allegation of paragraph (b) of the complaint.

4. Answering paragraph (c) of the complaint, on information and belief, admits that one Edward Cameron, attorney, came to defendant Sydney Eisenberg at the home of defendant, where defendant Alan D. Eisenberg does not reside nor was present, and appealed to Sydney M. Eisenberg to end the dispute between Judge Krueger, his fellow judges, the Milwaukee Bar, other attorneys, and Alan Eisenberg; that Attorney Sydney M. Eisenberg and Attorney Cameron participated in the preparation of a suggested statement which was changed several times thereafter not in defendant's presence by Judge Krueger; that Judge Krueger of his own free will and volition wrote Exhibit A out of the presence of both defendants.

5. Answering paragraph (d) of the complaint, admits that on Monday morning he told persons that Judge Krueger would read the statement, and denies each and every other allegation of paragraph (d) of the complaint.

6. Denies each and every allegation of paragraph (e) of the complaint.

7. Denies each and every allegation of the complaint not heretofore admitted or denied.

SECOND DEFENSE

Paragraph (a) of the complaint alleges in part:

> "That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, both individually and by concerted action, pursued a course of vindictive and reckless harassment and psychological persecution against Hon. John E. Krueger, County Judge of Milwaukee County, Wisconsin;"

and further:

> ". . . that defendants' conduct was of such aggravated nature as to cause Judge Krueger great mental suffering and anguish, which culminated in his death by his own hand on the 28th day of August, 1968."

Said allegations are irrelevant to the complaint herein, and to require defendant to proceed to hearing upon the matters quoted above will deny defendant a fair hearing and will require him to litigate the question of what caused Judge Krueger to commit suicide which is impossible to determine, and deprive him of due process of law in violation of Article I, Secs. 1, 13, and 22 of the Wisconsin Constitution and of the 14th Amendment to the United States Constitution.

THIRD DEFENSE

The statute pursuant to which this action is brought is vague and overbroad and is unconstitutional in that it violates rights guaranteed to defendant by the First and Fourteenth Amendments to the United States Constitution.

FOURTH DEFENSE

The complaint for discipline of the defendant for violation of that portion of Section 256.29, Wis. Stats., of the attorney's oath, as set forth in unnumbered paragraph first of the complaint under Count I, does not state a cause of action for discipline.

FIFTH DEFENSE

The complaint for discipline of the defendant for violation of that portion of Section 256.29, Wis. Stats., of the attorney's oath, as set forth in unnumbered paragraph first of the complaint under Count I, to wit, for not maintaining ". . . the respect due to the Courts of Justice and Judicial Officers", violates defendant's rights not to be subjected to or punished by bill of attainder and ex post facto law as provided by Article I, Sec. 12, Wisconsin Constitution.

SIXTH DEFENSE

The conduct set forth in that part of the complaint which alleges:

> ". . . defendants' conduct consisted of the following: '(a) . . . they caused to be publicly circulated state-

ments which they knew, or should have known, would reach Judge Krueger to the effect that said Judge was guilty of conduct for which a criminal warrant could be issued; that he would resign from the bench for personal reasons within 60 to 90 days or such warrant would be issued; and that said statements followed a series of advertisements in which defendants had participated, as alleged at Paragraph (2) hereof; . . .

"(b) That the defendants participated in causing the following advertisement to be run in The Milwaukee Journal and The Milwaukee Sentinel, from April 20, 1968, through April 26, 1968, and again from April 29, 1968, through May 5, 1968:

> 'All Persons With Complaints Against Judge John E. Krueger Write: Citizens' Committee for a more Dignified Traffic Court Judiciary, Greg Maxaculi, 728 Madison av., South Milwaukee, Wisconsin 53172'

"And the following advertisement to be run in The Milwaukee Sentinel and The Milwaukee Journal from May 14, 1968, through May 27, 1968, and in The Milwaukee Journal on June 11, 1968:

> 'All Complaints against Judge John E. Krueger write: Citizens' Committee, Greg Maxiculi [*sic*], 728 Madison ave., South Milwaukee, Wis.'

"(c) . . . that said emissary was told by defendant, Sydney M. Eisenberg, that, 'we have so much on him that we are really going to chop him up'; that in the negotiations that followed the emissary was told by Sydney M. Eisenberg: 'He's (Judge Krueger) going to have to agree to what Alan and I decide'; that in subsequent negotiations between defendants and said emissary a first draft of a press release was dictated by the defendant, Sydney M. Eisenberg, which became

> after certain revisions, the press release as read by Judge Krueger and which is attached hereto and incorporated herein and identified as 'Exhibit A';
>
> "(d) That in advance of the issuance and reading of the press release (Exhibit A), defendant, Alan David Eisenberg, did on Sunday night, August 25, 1968, and Monday morning, August 26, 1968, disseminate copies of 'Exhibit A' to several persons and boastfully read the same aloud in public and stated that if Judge Krueger did not read it Monday morning, he would be off the bench within 60 to 90 days and suggested to several persons that they be present in Judge Krueger's Court to witness the issuance of the press release. . . ."

is speech activity protected by the First Amendment to the Constitution of the United States, discipline for which is a denial of defendant's rights protected by the First and Fourteenth Amendments to the Constitution of the United States.

SEVENTH DEFENSE

The matters set forth in the complaint herein were the subject of an extensive John Doe investigation conducted in Milwaukee County, Wisconsin. The Judge who conducted such investigation found that no offense against the Laws of Wisconsin had been committed. To try, convict and discipline defendant on the allegations in the complaint, in this proceeding, denies the defendant due process of law and the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 1, 13 and 22 of the Wisconsin Constitution.

WHEREFORE, the defendant, Alan David Eisenberg, prays for the judgment and decree of this court dismissing said complaint and for such other and further relief as may be appropriate.

/s/ Alan David Eisenberg
Alan David Eisenberg

LAWTON & CATES
By: /s/ Richard L. Cates
Richard L. Cates
/s/ John H. Bowers
John H. Bowers

[Subscribed and sworn to by Alan D. Eisenberg on December 13, 1968.]

* * *

ANSWER [—formal parts omitted.]

COMES NOW the defendant, Sydney M. Eisenberg, in the above entitled matter, and for his answer to the complaint herein respectfully alleges and shows unto the court, as follows:

FIRST DEFENSE

1. Answering unnumbered paragraph first of the complaint herein, under "Count I", defendant submits that it contains principally conclusions of law which defendant is not required to answer. If answer is required, defendant admits that he took the attorney's oath as prescribed by sec. 256.29 Stats., and denies each and every other al-

legation of said unnumbered paragraph immediately preceding paragraph (a).

2. Answering paragraph (a) of the complaint herein although he was not present, he is informed and believes that Alan D. Eisenberg made the statement in response to a reporter's question, not in any courtroom, but in private conversation, that "I wouldn't be surprised if he was off the bench in the next two or three months for reasons that anybody can see; that you know about, that everybody knows about"; that one Gregorio Maxiculi [*sic*] came to defendant, Alan D. Eisenberg, seeking legal advice about running the ads set forth in paragraph (b) of the complaint; that the defendant, Alan D. Eisenberg, sought the advice of the Milwaukee Journal concerning said ads and that Alan D. Eisenberg was advised by the Journal, and in turn advised Maxiculi [*sic*], that the ads had the approval of the Milwaukee Journal Editorial Board and a legal opinion that the Journal was relying upon.

Further, answering paragraph (a) of the complaint defendant denies each and every other allegation of paragraph (a) of the complaint.

3. Answering paragraph (b) of the complaint, defendant is informed and believes that Alan D. Eisenberg provided legal counsel to one Maxiculi [*sic*] who ran the ads set forth in paragraph (b), as described in paragraph (2) herein, and denies each and every other allegation of paragraph (b) of the complaint.

4. Answering paragraph (c) of the complaint, admits that one Edward Cameron, attorney, came to defendant and appealed to him to end the dispute between Judge Krueger, his fellow judges, the Milwaukee Bar, other attorneys, and

Alan D. Eisenberg; admits that he and Attorney Cameron participated in the preparation of a suggested statement which was changed several times thereafter not in defendant's presence by Judge Krueger; that Judge Krueger of his own free will and volition read Exhibit A out of the presence of defendant; that every act, deed or statement by defendant Sydney Eisenberg was motivated and designed to help Judge Krueger; and denies each and every allegation of paragraph (c) of the complaint.

5. Answering paragraph (d) of the complaint, he is informed and believes that on Monday morning, Alan D. Eisenberg, told persons that Judge Krueger would read the statement. Further answering paragraph (d) of the complaint, denies upon information and belief each and every other allegation of paragraph (d) of the complaint.

6. Denies each and every allegation of paragraph (e) of the complaint.

7. Denies each and every allegation of the complaint not heretofore admitted or denied.

SECOND DEFENSE

Paragraph (a) of the complaint alleges in part:

> "That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, both individually and by concerted action, pursued a course of vindictive and reckless harassment and psychological persecution against Hon. John E. Krueger, County Judge of Milwaukee County, Wisconsin;"

and further:

> ". . . that defendants' conduct was of such aggravated nature as to cause Judge Krueger great mental suffer-

ing and anguish, which culminated in his death by his own hand on the 28th day of August, 1968."

Said allegations are irrelevant to the complaint herein and to require defendant to proceed to hearing upon the matters quoted above will deny defendant a fair hearing and will require him to litigate the question of what caused Judge Krueger to commit suicide which is impossible to determine, and deprive him of due process of law in violation of Article I, secs. 1, 13 and 22 of the Wisconsin Constitution and of the Fourteenth Amendment to the United States Constitution.

THIRD DEFENSE

The statute pursuant to which this action is brought is vague and overbroad and is unconstitutional in that it violates defendant's rights guaranteed to him by the First and Fourteenth Amendment to the United States Constitution.

FOURTH DEFENSE

The complaint for discipline of the defendant for violation of that portion of Sec. 256.29 Wis. Stats., of the attorney's oath as set forth in unnumbered paragraph first of the complaint under Count I, does not state a cause of action for discipline.

FIFTH DEFENSE

The complaint for discipline of the defendant for violation of that portion of Sec. 256.29, Wis. Stats., of the attorney's oath as set forth in unnumbered paragraph first of the complaint under Count I, to-wit: for not maintaining ". . . the respect due to the Courts of Justice and Judicial Officers;" violates defendant's rights not to be subjected to or punished by bill of attainder and ex post facto law as provided by Article I, Sec. 12, Wisconsin Constitution.

SIXTH DEFENSE

The conduct set forth in that part of the complaint which alleges:

> ". . . defendants' conduct consisted of the following:
>
> '(a) . . . they caused to be publicly circulated statements which they knew, or should have known, would reach Judge Krueger to the effect that said Judge was guilty of conduct for which a criminal warrant could be issued; that he would resign from the bench for personal reasons within 60 to 90 days or such warrant would be issued; and that said statements followed a series of advertisements in which defendants had participated, as alleged at paragraph (b) hereof; . . .
>
> (b) That the defendants participated in causing the following advertisement to be run in The Milwaukee Journal and The Milwaukee Sentinel, from April 20, 1968 through April 26, 1968, and again from April 29, 1968 through May 5, 1968:
>
> > 'All Persons With Complaints Against Judge John E. Krueger write: Citizens' Committee for a more Dignified Traffic Court Judiciary, Greg Maxaculi, 728 Madison Ave., South Milwaukee, Wisconsin 53172'
>
> "And the following advertisement to be run in The Milwaukee Sentinel and the Milwaukee Journal from May 14, 1968, through May 27, 1968, and in The Milwaukee Journal on June 11, 1968:

> 'All Complaints against Judge John E. Krueger write: Citizens' Committee, Greg Maxiculi [*sic*], 728 Madison Ave., South Milwaukee, Wis.'
>
> "(c) . . . that said emissary was told by defendant, Sydney M. Eisenberg that, 'We have so much on him that we are really going to chop him up'; that in the negotiations that followed the emissary was told by Sydney M. Eisenberg: 'He's (Judge Krueger) going to have to agree to what Alan and I decide'; that in subsequent negotiations between defendants and said emissary a first draft of a press release was dictated by the defendant, Sydney M. Eisenberg which became after certain revisions, the press release as read by Judge Krueger and which is attached herein and incorporated herein and identified as 'Exhibit A';
>
> "(d) That in advance of the issuance and reading of the press release (Exhibit A), defendant, Alan David Eisenberg, did on Sunday night, August 25, 1968, and Monday morning, August 26, 1968, disseminate copies of 'Exhibit A' to several persons and boastfully read the same aloud in public and stated that if Judge Krueger did not read it Monday morning, he would be off the bench within 60 to 90 days and suggested to several persons that they be present in Judge Krueger's Court to witness the issuance of the press release. . . ."

in speech activity protected by the First Amendment to the Constitution of the United States, discipline for which is a denial of defendant's right protected by the First and Fourteenth Amendment to the Constitution of the United States.

SEVENTH DEFENSE

The matters set forth in the complaint herein were the subject of an extensive John Doe investigation conducted in Milwaukee County, Wisconsin. The Judge who conducted such investigation found that no offense against the Laws of Wisconsin had been committed. To try, convict and discipline defendant on the allegations in the complaint, in this proceeding, denies the defendant due process of law and the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Sections 1, 13 and 22 of the Wisconsin Constitution.

WHEREFORE, the defendant, Sydney M. Eisenberg, prays for the judgment and decree of this court dismissing said complaint and for such other and further relief as may be appropriate.

/s/ SYDNEY M. EISENBERG
Sydney M. Eisenberg

LAWTON & CATES
By: /s/ RICHARD L. CATES
Richard L. Cates
/s/ JOHN H. BOWERS
John H. Bowers

* * *

[ORDER.]

Madison, December 20, 1968

To Hon. Herbert A. Bunde
Wisconsin Rapids, Wis. 54494

Lawton & Cates
Attorneys at Law
Madison, Wisconsin 53703

Mr. Rudolph P. Regez
Attorney at Law
Monroe, Wisconsin 53566

Sir:—The Court today announced decision in your case as follows:

STATE v. ALAN DAVID EISENBERG and SYDNEY M. EISENBERG, St. #107

IT IS ORDERED that Hon. Herbert A. Bunde of Wisconsin Rapids, be and he is hereby appointed as Referee in the above-entitled cause to try the factual issues and report his findings of fact and recommendations to the Court. Legal questions raised by the pleadings are reserved by this Court for further consideration.

No opinion filed.

Respectfully yours,

Franklin W. Clarke
Clerk of Supreme Court

* * *

NOTICE OF TRIAL [—not printed.]

* * *

MOTION FOR CHANGE IN APPOINTMENT OF REFEREE ON GROUNDS OF PREJUDICE [—formal parts omitted.]

SIR:

PLEASE TAKE NOTICE that upon the affidavits, of which copies are hereto annexed and herewith served upon you, the defendant Alan David Eisenberg, and for purpose of consent, Sydney M. Eisenberg, by their attorneys, move the court for an order changing the appointment of the Honorable Herbert A. Bunde, of Wisconsin Rapids, as referee in the above entitled cause, on the grounds set forth in said affidavits.

Dated at Madison, Wisconsin, this 2nd day of January, 1969.

LAWTON & CATES

By: /s/ RICHARD L. CATES
Richard L. Cates
Defendants' attorney

TO: Rudolph P. Regez
Attorney at Law
Monroe, Wisconsin
Attorney for Plaintiff

AFFIDAVIT OF PREJUDICE [—formal parts omitted.]

ALAN D. EISENBERG, being first duly sworn on oath, deposes and says; that he is one of the Defendants in this action and that he has good reason to believe, and does so believe, that he cannot have a fair trial in such action on account of the prejudice of the Referee thereof, the HONORABLE HERBERT A. BUNDE; and the Defendant makes this Affidavit for the purpose of applying for the change of the place of trial to some Branch of the Court where the cause complained of does not exist.

/s/ ALAN D. EISENBERG
Alan D. Eisenberg

[Subscribed and sworn to by Alan D. Eisenberg on December 30, 1968.]

CONSENT [—formal parts omitted.]

SYDNEY M. EISENBERG, being first duly sworn on oath, deposes and says to the Court as follows, to-wit: That he is the Co-Defendant in this action and that he does consent to the appended Affidavit of Prejudice filed by his Co-Defendant, ALAN D. EISENBERG, and for purposes of consent only, he does join in this Affidavit of Prejudice.

/s/ SYDNEY M. EISENBERG
Sydney M. Eisenberg

[Subscribed and sworn to by Sydney M. Eisenberg on December 30, 1968.]

* * *

ORDER [—formal parts omitted.]

The motion of defendant Alan David Eisenberg, consented to by defendant Sydney M. Eisenberg, for a change in the appointment of a Referee has been considered by the Court, and

IT IS ORDERED that said motion be and the same is hereby denied.

Dated at Madison, Wisconsin, this 6th day of January, 1969.

BY THE COURT:

/s/ FRANKLIN W. CLARKE
Franklin W. Clarke
Clerk of Supreme Court

(SEAL)

* * *

NOTICE OF TIME AND PLACE OF TRIAL [—not printed.]

* * *

MOTION FOR DISCOVERY, CHANGE IN REFEREE AND FOR OPPORTUNITY TO PREPARE DEFENSE; MOTION TO DOCKET, SET BRIEFING SCHEDULES AND FOR ORAL ARGUMENT REGARDING THE LEGAL QUESTIONS RAISED BY THE PLEADINGS IN THE ABOVE MATTER AND TO ENJOIN REFEREE FROM PROCEEDING TO HEARING UPON THE FACTUAL ISSUES PENDING THE DECISION OF THIS COURT ON THE LEGAL QUESTIONS [—formal parts omitted.]

Now comes Alan David Eisenberg and Sydney M. Eisenberg, individually and by Attorney Richard L. Cates and John H. Bowers, and by Lawton & Cates, on the affidavit attached hereto and on the pleadings and papers on file, and move the court for the right to take discovery under the Constitutions of the United States and of Wisconsin, and Wisconsin Statutes, Sections 256.28(12) and 887.12; for a change in referee; and for an order delaying the time set for trial until the defense can complete its discovery and adequately prepare the matter for trial.

For a second motion, now comes Alan David Eisenberg and Sydney M. Eisenberg, individually and by Attorneys Richard L. Cates and John H. Bowers, and Lawton & Cates, on the affidavit attached hereto, and on the pleadings and papers already on file, and move the court for an order docketing the legal questions raised by the pleadings herein, establishing briefing schedules and setting the matter for oral argument, and for the further order of this court continuing the date for the factual hearing until a final decision on the legal questions is had.

Dated this 15th day of January, 1969.

/s/ Lawton & Cates
Lawton & Cates, Attorneys

Alan David Eisenberg, Attorney
Sydney M. Eisenberg, Attorney

AFFIDAVIT OF RICHARD L. CATES [—formal parts omitted.]

Richard L. Cates, being first duly sworn, on oath, deposes and says:

1. That he is one of the attorneys representing the defendants, Alan and Sydney Eisenberg, and that he makes this affidavit in support of motions by defendants for discovery, for the appointment of a new referee, to postpone the hearing to permit discovery, and to prepare their defense, and finally to support defendants' position that the legal questions raised should be argued prior to hearing.

2. That he was retained in this matter in late October of 1968, after the complaint had been filed against the two defendants; that at the time he was retained an answer or other responsive pleading to the complaint was required to be filed around the middle of November. That your affiant, together with John H. Bowers and Bruce Ehlke, proceeded to spend substantial amounts of time on the case. This work involved the location and reading of large numbers of Milwaukee newspaper accounts covering the facts surrounding the incident in order to locate possible witnesses and the making of several trips to Milwaukee in an attempt to locate and interview these witnesses. Further, it was necessary to read a great deal of law re-

lating to the procedure and substantive principles applicable to the case; that as a result of this work it was your affiant's advice to the defendants in this case that they should move to strike a number of portions of the complaint and that they should demur, all on the basis that there was substantial legal authority existing for making such a response; that it was your affiant's belief and it still is that these responses to the complaint are meritorious.

3. That it was and still is the opinion of affiant and his law partner, John H. Bowers, that the Wisconsin case, *In Re Cannon* (1932), 206 Wis. 374, 240 N. W. 441, conclusively determined that an attorney couldn't be disciplined for alleged disrespect of a sitting judge.

4. That it was and still is your affiant's opinion that it is impossible to litigate the allegation of the complaint that any of the actions of defendants culminated in Judge Krueger's taking his own life.

5. That it was and is your affiant's opinion expressed to these defendants that because it is an impossible fact question to decide, that to require anybody to defend against such an allegation would be a denial of a right without due process of law in violation of both state and federal constitutions.

6. That it was and is your affiant's advice to these defendants that this allegation is impossible to make an answer to because the allegation involves mere conclusions which give no evidence as to what it is based upon with the result that a denial is meaningless.

7. That it was and is your affiant's advice to these defendants that this allegation because it involved only

conclusions was very unfair, as it gives no evidence of what facts we might anticipate being given to prove it with the result that preparation of our defense would be impossible.

8. That for these reasons, these defendants upon the advice of affiant, interposed the motions to strike, dismiss and demur, which they timely did, together with supporting affidavits and statement of authorities as required by rules of the court. That affiant on behalf of defendants requested the opportunity to file a brief and appear orally to argue the questions.

9. That notwithstanding the authorities cited and the request of counsel to appear and argue, the Supreme Court denied these motions without opinion and ordered defendants to answer within ten days; that pursuant to that directive of the Supreme Court your affiant advised the defendants that they had no alternative except to answer the complaint within the time prescribed; that therefore these defendants did answer within the time prescribed notwithstanding their inability to fully understand what facts the State would rely upon to support the conclusions which were included in the complaint; that because of the Supreme Court's order denying the defendants' prior motions without opinion, and because the motions to strike and dismiss were denied without prejudice, defendants answer on advice of affiant set forth the same or similar legal defenses previously raised by motion and in addition the legal defense that the prosecution of these defendants on the basis set out in the complaint is in violation of the free speech provisions of the federal and state constitutions for reasons of vagueness and overbreadth.

10. That this legal question had not been included in the defendants' first responsive pleadings because under established constitutional law it is sometimes appropriate first to seek from the court or agency responsible a narrowing construction of the breadth and scope of the particular provisions upon which they rely before it is measured by standards of vagueness and overbreadth.

11. That defendants' answers were timely filed sometime in December and that shortly thereafter on December 20 the Honorable Herbert A. Bunde was appointed as referee to sit and hear this case; that the order appointing Judge Bunde included the following provision:

> ". . . Legal questions raised by the pleadings are reserved by this court for further consideration."

12. That thereafter by reason of the belief on the part of defendant Alan David Eisenberg that the Honorable Herbert A. Bunde could not sit fairly and impartially on his case, which belief was evidenced to the court in the customary form by an affidavit of prejudice, defendant Alan David Eisenberg moved for a change of referee based on his affidavit; that Sydney M. Eisenberg consented to the motion for the appointment of a new referee; that this motion together with the supporting affidavits was filed late Friday afternoon, January 3, 1969, that your affiant was advised by the State Prosecutor Rudolph P. Regez Monday morning, January 6, 1969, that the Court had denied this motion for a change of referee.

13. That at approximately 3:00 p.m. on January 6, 1969, pursuant to a prior arrangement with the State Prosecutor Rudolph P. Regez, a telephone conference call was arranged wherein John H. Bowers and affiant representing

the defendants conferred with the State Prosecutor Rudolph P. Regez and Referee Judge Herbert A. Bunde; that in this conference call the State Prosecutor Regez insisted that a trial date be set sometime in January; that on behalf of the defendants your affiant advised the referee that he could not possibly be ready for trial within that period and that it was his opinion that a number of legal questions had to be decided before any hearing was set.

14. That your affiant stated in the conference call that it was the intent of defendants on the advice of your affiant to move the Supreme Court for separate trials for each of the defendants and to take up the legal questions included in the answer prior to the trial's proceeding because several of these questions if answered favorably to the defendants would make it unnecessary for the trial to proceed.

15. That your affiant explained in the conference call that because of the order of the Supreme Court reserving legal questions to the Court it was impossible to raise these questions with the referee.

16. That your affiant explained in the conference call that the legal questions involved matters other than those raised previously by the defendants' motions to strike, dismiss and demur, and that the principal difference was that one of the legal questions raised by the answer and not previously raised was that these proceedings were in violation of the free speech provisions of the state and federal constitutions in that the statute and standards set by it on which defendants were being disciplined were vague and overbroad.

17. That your affiant, in addition, advised the parties to the conference call that it would be impossible to adequately prepare this case without having an opportunity to examine witnesses in discovery proceedings prior to the trial.

18. That your affiant explained that he had attempted to contact material witnesses in Milwaukee and that they had refused to talk to him, that thereupon the state prosecutor stated that defendants through their counsel were not entitled to make use of discovery proceedings for preparation of their case and that he would oppose any such request.

19. That your affiant advised, in the conference call, any number of times, that it would be impossible to defend this case without the right of pretrial discovery.

20. That thereupon Referee Judge Herbert A. Bunde advised the parties to the conference that he would be unavailable for two months from around the beginning of February.

21. That thereafter in this conference call Referee Judge Bunde advised your affiant that your affiant on behalf of the defendants would have to raise all these questions discussed with the Supreme Court on or before January 15, 1969.

22. That in addition Referee Judge Bunde advised your affiant that the defendants must be prepared to be ready for trial sometime on or before February 1, 1969.

23. That your affiant advised Referee Judge Bunde and State Prosecutor Regez that it would be impossible for the defendants to be ready and prepared for trial by

that time. Notwithstanding this statement, the referee adhered to his decision that defendants through their counsel must be prepared to try this case on or before February 1, 1969.

24. That your affiant repeated that it would be impossible to adequately defend this case whenever it might be set if defendants were not permitted the right to pretrial discovery.

25. That your affiant wishes to advise the court that it is his opinion that unless defendants are permitted to engage in pretrial discovery it will be impossible adequately to prepare their defense; that denial of pretrial discovery would in effect result in a denial of counsel, as in affiant's opinion no counsel could adequately prepare or represent these defendants without pretrial discovery.

26. That your affiant after he was retained in late October read various newspaper accounts of the alleged acts, statements and conduct surrounding the suicide of Judge Krueger; that a number of these articles contained references to persons who it appeared had information relating to these facts; that one of the most important facts that must be material in a case such as this was reported in the Sentinel newspaper on August 29, which was a disclosure by Judge Krueger to Sentinel Editor Schwander that he, Judge Krueger, had committed some personal indiscretion; this disclosure, the article advised, was made in the presence of Judge Krueger's deputy, Stephen Kuzmic; that your affiant in order to adequately prepare his defense attempted to interview Editor Schwander and Mr. Kuzmic; that both of these individuals refused to speak with your affiant about the matter; that Editor Schwander

stated to your affiant that his refusal was on the advice of counsel and that he would not talk unless he were subpoenaed; that neither defendants nor your affiant without the aid of discovery can have any way of knowing what disclosures Judge Krueger made; Editor Schwander further advised your affiant that none of the newspapermen in his organization would be permitted to talk to your affiant either and that this too was on the advice of their counsel.

27. That it appears from a Sentinel newspaper article of August 29 and from the report of John Doe magistrate Circuit Judge John Decker that the act of misconduct on the part of Judge Krueger weighed very heavily on his conscience; both of which were attached as Exhibits C and D to an affidavit of your affiant dated November 14, 1968, filed in this action in support of defendants' motion to strike allegations from the complaint and which are part of the record herein; that evidence of this character is obviously vitally material to the allegation as to the cause for a man taking his own life; that Exhibits C and D of affiant's prior affidavit are incorporated herein by reference.

28. That in addition your affiant has been unable to learn through any source who it is upon whom the State intends to rely to establish certain statements which have been alleged were made by defendant Alan David Eisenberg, none of which anyone alleges were made to Judge Krueger; the complaint does not identify to whom they were made, when or where they were made, the circumstances they were made under, or the nature of the conversation that was going on at any time or place; newspaper accounts carry information which indicate that de-

fendant Alan David Eisenberg is supposed to have said various things about Judge Krueger's ability to sit on the bench; it is impossible, however, from the newspaper accounts to tell what it is that Alan David Eisenberg is alleged to have said, to whom it was said, when and where it was said, and under what circumstances it was said, because in many instances no author is given or because where the author is identified, he is writing about what allegedly was said to some other un-named reporter.

29. That various newspaper articles are attached hereto, all as Exhibit 1, and incorporated by reference; that these articles are attached for purposes of evidencing to the court the factual information which appears to be available, the details of which are essential to any effective defense preparation.

30. That your affiant without the aid of pretrial discovery has absolutely no way of finding out material facts which are essential to assist him or any other lawyer in preparing a defense for these defendants or in participating in a meaningful way in any inquiry dedicated to determining the truth; that to deny these defendants pretrial discovery is to deny defendants their right to participate in this inquiry.

31. That your affiant engages in the trial of cases which cover a variety of fields, that he has so worked on the trial of cases and proof of facts for a period in excess of 15 years; that based on his experience it is his opinion that the matters put in issue by the complaint cannot be defended against without very substantial preparation; that it is his opinion that this preparation will take a substantial period of time and will require the advice of expert medical witnesses.

32. That the complaint and answer put in issue, among other things, what was the cause of Judge Krueger's suicide; that in order to do justice to these defendants and to permit them to defend against the accusation that their alleged acts or deeds culminated in Judge Krueger's taking his own life, it is only fair that they be permitted to know and understand what the physical and emotional condition of Judge Krueger was on August 28, 1968, and prior thereto, which was the day he took his own life; that in addition to knowing the relevant physical and emotional history of Judge Krueger it would be essential to know and understand what other pressures there were in existence which might have had an effect on Judge Krueger's conduct; that it is essential to an adequate defense to know and understand what misconduct, if any, Judge Krueger may have been involved in in order to know the extent to which this misconduct would cause his suicide; that it is essential in addition to knowing the physical and emotional condition of Judge Krueger to know and understand all of the man's values and goals which he may have believed were in jeopardy by reason of some act of personal misconduct; that in addition it would be essential to know and understand what the effect of other pressures on Judge Krueger were at the time he took his own life; that it would be essential to know and understand what effect a possible transfer from his traffic court to another civil court would have had on his then physical and mental state; or what effect an inquiry or investigation by the District Attorney for Milwaukee County would have had on his then physical and mental condition; or what effect the various other pressures that appear to have been in existence or identified in the various newspaper articles

included in Exhibit 1 to this affidavit would have had on Judge Krueger at the time he took his own life.

33. That on Friday, January 10, 1969, affiant received a notice from Referee Judge Bunde that this matter had been set for trial on February 4, 1969; that this affidavit is made to support a motion for change in referee as it is impossible to fairly try this case on February 4, 1969, and because Judge Bunde's personal schedule is such that he would not be available for several months following that day; that this affidavit is made also to support a motion for discovery the same as is accorded all litigants in all civil litigation involving many times rights substantially less valuable than those at stake in this case, and which in most instances involve factual issues substantially less complicated; that this affidavit is made to support a motion postponing the factual trial of the law suit until these discovery proceedings can be had and counsel for defendants can otherwise properly prepare their defense.

34. That this affidavit is also made to support defendants' request that the legal questions be heard and decided prior to hearing in this matter; that affiant and his law partner John H. Bowers have set forth on brief the various reasons why it is necessary consistent with constitutional guarantees to determine these questions before hearing; that it is no answer to these constitutional requirements to order the hearing with the idea that the court in its superintending role in this matter can later insure these constitutional protections because the hearing itself constitutes a violation of fundamental constitutional rights.

/s/ RICHARD L. CATES
Richard L. Cates

[Subscribed and sworn to by Richard L. Cates on January 15, 1969.]

[Exhibit 1, copies of newspaper clippings attached to the affidavit of Richard L. Cates, is not printed.]

* * *

MOTION FOR SEPARATE TRIAL BY ALAN DAVID EISENBERG [—formal parts omitted.]

Now comes the defendant, Alan David Eisenberg, individually and by Attorneys Richard L. Cates and John H. Bowers, and by Lawton & Cates, on the affidavits attached hereto and on the other papers and pleadings on file, moves the court for a separate trial.

Dated this 15th day of January, 1969.

/s/ LAWTON & CATES

Lawton & Cates, Attorneys
Alan David Eisenberg, Attorney

MOTION FOR SEPARATE TRIAL BY SYDNEY M. EISENBERG [—formal parts omitted.]

Now comes the defendant, Sydney M. Eisenberg, individually and by Attorneys Richard L. Cates and John H. Bowers, and by Lawton & Cates, on the affidavits attached hereto and on the other papers and pleadings on file, moves the court for a separate trial.

/s/ LAWTON & CATES
Lawton & Cates, Attorneys
Sydney M. Eisenberg, Attorney

AFFIDAVIT OF ALAN DAVID EISENBERG [—formal parts omitted.]

ALAN DAVID EISENBERG, being first duly sworn on oath, deposes and says:

1. That he is one of the defendants in the above entitled action, that he is 27 years of age, is married, and lives with his wife at Milwaukee, Wisconsin.

2. That he graduated from Marquette Law School in June of 1966 and joined Miriam L. Eisenberg and Sydney M. Eisenberg in the practice of law; that he has been with them continuously since that time; that since the time he has joined this firm in the law practice he has handled almost exclusively criminal and traffic work.

3. That Sydney M. Eisenberg is the head of the firm; that the firm conducts its practice at 1131 West State Street, Milwaukee, Wisconsin; that Sydney M. Eisenberg specializes in civil trial and labor law work; that in addition to his law practice, Sydney M. Eisenberg has substantial administrative responsibilities.

4. That since your affiant joined this firm in the practice of law he has not worked cases with Sydney M. Eisenberg; that he does not see Sydney M. Eisenberg on a day-to-day basis.

5. That to his knowledge since your affiant joined the firm, Sydney M. Eisenberg has had little or no contact with Judge Krueger; that your affiant and other members or associates of the firm have done virtually all of the work in the various traffic and criminal courts in Milwaukee County.

6. That your affiant's first personal contact with Judge Krueger was when he appeared as a defendant in a traffic action while he was still a student at Marquette University; that in this case your affiant was charged with an illegal U turn; that the case was tried before Judge Krueger who found your affiant guilty; that the case was taken by your affiant to the Wisconsin Supreme Court where the judgment was affirmed; that your affiant believes that this case had significance in his relationship with Judge Krueger for on many occasions subsequent to the conclusion of the case in the Supreme Court, when your affiant appeared before Judge Krueger, the Judge would cite the case as an authority for many decisions the Judge made.

7. That for some time prior to August 28, 1968, based on personal observations, conversations had with other persons relative to their experiences with Judge Krueger, and from happenings reported in the press, your affiant believed that Judge Krueger many times exercised his office in an intemperate, irrational, and emotionally unstable manner.

8. That either by personal observation, reading, or conversation he knew of occasions when Judge Krueger conducted himself on the bench in the following ways: he handled some forty odd cases in approximately the same amount of minutes, one of which cases was a contested drunk driving case; that he had refused people whom he had fined the time to raise their fines with the result that they had to go to jail; that this had included pregnant women; that on a number of occasions he had forfeited bail bonds because of the tardiness of the defendant; that he had adjudged persons guilty notwithstanding a jury ver-

dict acquitting the defendant; that he had refused to honor affidavits of prejudice; that he had denied persons their right to counsel; that he refused to permit a record made of the proceedings before him in a number of cases; that he had shown disrespect to persons appearing before him and that he had engaged in the use of descriptive words which evidenced the fact that he was bigoted.

9. That after your affiant began his practice he was maligned by Judge Krueger in many of his appearances before him; that as a result your affiant decided that he couldn't receive a fair trial for his clients before Judge Krueger and for that reason filed affidavits of prejudice on behalf of these persons in a very substantial number of cases.

10. That affiant was driven to this course of action by Judge Krueger for the above reasons and for the Judge's persistent refusal to permit a record to be made of proceedings before him and because of the Judge's many comments made to affiant or affiant's clients as, for example, when affiant was making a closing argument to the jury, Judge Krueger said, interrupting argument:

"The jury knows that I will sentence him."

11. That in addition to the knowledge acquired by affiant set out above, your affiant learned from associate lawyers in his father's firm of conversations had between these attorneys and Judge Krueger wherein Judge Krueger attempted to influence these associates to leave his firm; that in addition, your affiant learned that his firm was referred to by Judge Krueger and his court personnel as the "zoo".

12. That in addition to all this, affiant was advised by several of his clients in April of 1968 that when they appeared before Judge Krueger represented by other associates of the law firm, that Judge Krueger referred to the firm for which the associate worked as "that jew on 11th street"; that copies of affidavits of Loren Cherney and David Redlich executed April 8, 1968, and April 16, 1968, respectively, are attached to this affidavit and incorporated by reference to have the same force and effect as if set forth in full.

13. That because of all of the above circumstances your affiant felt that Judge Krueger was not a suitable person to sit in judgment of persons and carry out our tradition of a government of laws and for this reason your affiant filed grievances against Judge Krueger with the Court Administrator, Edwin Wilkie, at Madison, Wisconsin, with the Chairman of the Board of Circuit Judges for Milwaukee County, Elmer Roller, and complained to a Wisconsin legislative committee investigating the Milwaukee court system.

14. That all of these complaints were to no avail; that as your affiant registered his feelings in the community, others who had complaints against Judge Krueger's intemperate, irrational, and emotionally unstable actions contacted your affiant; one of such persons was Gregorio Maxaculi, who is one of the leaders of the Greek community in the United States. Mr. Maxaculi had been upset at remarks which Judge Krueger had directed at Judge Seraphim; that for this reason Mr. Maxaculi consulted your affiant to attempt a recall of Judge Krueger pursuant to the Wisconsin Statutes.

15. That in discussion of these forms of relief, your affiant advised Mr. Maxaculi that such a solution was only possible if there were sufficient numbers of persons willing to work for the recall because the Statutes required a substantial number of signatures petitioning for this remedy; that Mr. Maxaculi suggested that he intended to secure names of persons interested in accomplishing a recall if an advertisement were run in the newspaper asking for people who had complaints against Judge Krueger to contact him; that thereafter Mr. Maxaculi, with the knowledge of your affiant, caused an ad to be run in both Milwaukee papers soliciting the identity of persons who had complaints against Judge Krueger; that the purpose of these ads was to secure the identity of people who might be interested in working toward the recall of Judge Krueger and who had complaints against Judge Krueger; that this ad was run under the name of a Committee for a More Dignified Judiciary.

16. That throughout the spring and summer of 1968 your affiant was working extremely hard, that among other cases he handled the defense of John Ora Tucker charged with ten counts of murder; that this trial and preparation took months; that during this period your affiant had little or no contact with Sydney M. Eisenberg.

17. That your affiant had occasion to observe Judge Krueger in the summer months prior to August 28, 1968; that your affiant from his observations of Judge Krueger believed that Judge Krueger was mentally unsuited to sit as a Judge in a court of law; that your affiant sincerely believed it would be for the benefit of the public if Judge Krueger were off the bench.

18. That it appeared to your affiant that Judge Krueger was becoming sicker and that he would not be able to continue in the traffic court for a much longer period of time.

19. That it appeared to your affiant that whereas in the morning the Judge would appear quite reasonable, after a couple of hours on the bench he was sometimes violent, acting many times arbitrarily and without reason.

20. That your affiant first learned that Attorney Cameron had approached his father on Friday night, August 23, 1968; that your affiant learned this when his father called him at his home; that Sydney M. Eisenberg tried to get your affiant to shake hands and make peace with Judge Krueger who Attorney Cameron had said was a very sick man.

21. That in deference, however, to Sydney M. Eisenberg, who advised your affiant that under the circumstances it was only fair and decent to forgive a person who was sick and needed help, your affiant offered no objection to shaking hands and making peace.

22. That your affiant was in his own office on Saturday, August 24, 1968, when Attorney Cameron and Sydney M. Eisenberg met and worked on a news release; that your affiant did not participate in drafting the release and was with Sydney M. Eisenberg and Attorney Cameron for only a few moments; that affiant did not know of the contents of the press release until Sunday, August 25, 1968.

23. That your affiant was present on August 25, 1968, at the home of Sydney M. Eisenberg; that although everyone was extremely friendly at this meeting, your affiant

still did not believe the creation of a committee was an effective means of doing what was necessary for the Milwaukee County court system.

24. That later in the day at the request of Attorney Cameron he went to the home of Attorney Cameron where he was given the press release which Judge Krueger had decided he would issue the next morning; that on this occasion Attorney Cameron and Judge Krueger were extremely friendly to your affiant; that your affiant had been asked by Attorney Cameron to represent his wife in a pending traffic charge against her and had gone to his home to pick up the ticket; that your affiant was flattered and honored by this request and for the first time since his father had contacted him by telephone the preceding Friday, your affiant felt that this committee might be honestly willing to try to effectuate the changes necessary for Milwaukee County; that this request of your affiant to represent Attorney Cameron's wife convinced your affiant that the approach made by Judge Krueger and his agent, Attorney Cameron, was a sincere approach; that until this show of friendship and trust your affiant had not been sure that the approach had been sincere.

25. That because your affiant now believed that there was going to be an honest effort to effectuate change, he became quite proud of what was going to happen. He believed that he had participated in something that was truly of significance for the people and court system of Milwaukee County; that for that reason, he was on hand at the time the statement was released to the public in Judge Krueger's court on Monday, August 26, 1968.

26. That the statement read by Judge Krueger was Judge Krueger's own statement and was a statement that he chose of his own will and volition to read; that your affiant neither individually nor in concert with any other person conducted any course which was designed to embarrass, harass, or force Judge Krueger to do anything against his will.

27. That at no time did your affiant act in any way in conjunction with Sydney M. Eisenberg to embarrass, harass or force Judge Krueger to do anything against his will; that neither he nor Sydney M. Eisenberg ever acted as agent for each other, nor to his knowledge was any authority given one to the other to act or to do anything on the other's behalf.

28. That notwithstanding the fact that the other defendant in this case is your affiant's father, Sydney M. Eisenberg, your affiant believes to be deprived of his own separate trial would substantially prejudice his ability to receive a fair trial for the following reasons:

A. In any case where there is a charge of unprofessional conduct made against a person, that person should have the right to have his conduct examined fully and fairly without consideration having to be given to what some other person may have done or said; affiant's license to practice law is his own and is not issued jointly, and was granted only after a lifetime of diligent study and training, and at great expense.

B. In a case where the allegations are so prejudicial as they are here, it is only fair and reasonable to permit any person so charged to be tried by himself; that if required to defend against these allegations and be tried with another, where the alleged acts of other persons or witnesses can be introduced, makes defense completely impossible.

C. In a case where the allegations of the complaint raise such difficult fact questions, such as what caused Judge Krueger to take his own life, it would be impossible to a fair determination of those complicated questions as they related to anything your affiant did or said to have to at the same time consider what the effect of what another person similarly accused may have done or said.

D. The nature of the complaint in this case charging affiant and Sydney M. Eisenberg only by conclusions leaves affiant at a decided disadvantage in preparing and presenting a defense as he doesn't know what conduct of his or Sydney M. Eisenberg the State may consider appropriate to establish these conclusions. To be required to stand trial with another, even his father, Sydney M. Eisenberg, under these circumstances is doubly unfair as such a situation permits the State to present not only unspecified acts and deeds of affiant, but in addition unspecified acts and deeds of his father, Sydney M. Eisenberg.

E. That it appears from the complaint that some of the evidence which is to be introduced may be statements alleged to have been made by Sydney M. Eisenberg; that your affiant has no knowledge of any such statements; the complaint does not allege to whom the statements were made, nor when nor where the statements were made, what the circumstances of the conversation was, nor what other conversation may have been spoken; that it is impossible for Sydney M. Eisenberg to properly prepare or present a defense to these statements absent allegations identifying this necessary information; to require affiant to be tried along with another who is by reason of the form of the complaint unable to be fairly tried is doubly prejudicial to your affiant.

/s/ Alan David Eisenberg
Alan David Eisenberg

[Subscribed and sworn to by Alan David Eisenberg on January 14, 1969.]

AFFIDAVIT [—formal parts omitted.]

LOREN CHERNY, being first duly sworn on oath, deposes and says as follows:

1. That he is the defendant in the matter of City of Milwaukee v. Loren Cherny and was present in the Court Room of the Honorable John E. Krueger on the 2nd day of April, 1968 at approximately 2:30 P. M.;

2. That your affiant states that at approximately 2:30 P. M., your affiant was represented in said Court by Attorney John P. FitzMaurice, who was at that time representing another client as well by the name of Kenneth Karasci;

3. That your affiant states further that he had retained the firm of EISENBERG, KLETZKE & EISENBERG and that Attorney John P. FitzMaurice was present in Court representing that firm on the day in question;

4. That your affiant states further that as Attorney FitzMaurice approached the Bench with Mr. Karasci, the Honorable John E. Krueger did say to Kenneth Karasci: "I suppose you're here to file an Affidavit of Prejudice;

where you're going for sure you will get six (6) points, with me, you might at least have gotten off with three (3) and you sure picked the right counsel, the Motor Vehicle Department is taking his license away next week;

5. Then the Honorable John E. Krueger turned to Attorney FitzMaurice and said to him: "How long are you going to keep working for that mill? You seem to be a nice fellow. How long are you going to keep working for that Jew on 11th Street?"

WHEREFORE, this Affidavit is made in the interests of justice.

/s/ Loren Cherny
Loren Cherny

[Subscribed and sworn to by Loren Cherny on April 8, 1968.]

AFFIDAVIT [—formal parts omitted.]

DAVID AUGUST REDLICH, being first duly sworn on oath, deposes and says as follows:

1. That he is the defendant in the matter of State of Wisconsin v. David August Redlich and was present in the Court Room of the Honorable John E. Krueger on the 2nd day of April, 1968 at approximately 2:30 P. M.;

2. That your affiant states that at approximately 2:30 P. M., your affiant was represented in said Court by Attorney John P. FitzMaurice, who was at that time representing other clients, namely Loren Cherny and Kenneth Karasci;

3. That your affiant states further that he had retained the firm of EISENBERG, KLETZKE & EISENBERG and that Attorney John P. FitzMaurice was present in Court representing that firm on the day in question;

4. That your affiant states further that as Attorney FitzMaurice approached the Bench with Mr. Karasci, the Honorable John E. Krueger did say to Kenneth Karasci: "I suppose you're here to file an Affidavit of Prejudice; where you're going for sure you will get six (6) points, with me, you might at least have gotten off with three (3) points and you sure picked the right counsel, the Motor Vehicle Department is taking his license away next week";

5. Then the Honorable John E. Krueger turned to Attorney FitzMaurice and said to him: "How long are you going to keep working for that mill? You seem to be a nice fellow. How long are you going to keep working for that Jew on 11th Street?" "Your lawyer will lose his license next week, you should hire Mr. FitzMaurice";

6. That thereafter the Honorable John E. Krueger, addressing Attorney FitzMaurice, said: "Are you going to stay up there for the rest of your life?", and then the Judge pointed to Mr. FitzMaurice and said: "Here's a man of a different caliber";

7. That at the time your affiant heard these remarks he was standing right in front of the Bench as his case had been called prior to the time when these statements were made, as contained herein.

WHEREFORE, this Affidavit is made in the interests of justice.

/s/ David August Redlich
David August Redlich

[Subscribed and sworn to by David August Redlich on April 16, 1968.]

AFFIDAVIT OF SYDNEY M. EISENBERG [—formal parts omitted.]

Sydney M. Eisenberg, being first duly sworn, on oath, deposes and says:

1. That he is one of the defendants in this case, that he makes this affidavit in support of his motion for a separate trial and his demand upon the state to establish for the court a prima facie showing of conspiracy.

2. That he is 52 years of age and lives with his wife Miriam at 3901 North Lake Drive, Milwaukee, Wisconsin.

3. That he attended Marquette Law School and was admitted to practice in 1939 and that he has practiced law continually in the City of Milwaukee since that time; that he presently practices at 1131 West State Street, Milwaukee, Wisconsin, and that he has practiced law at that location for approximately 30 years.

4. That in August of 1968 and for some years prior thereto there have been five or more attorneys including himself practicing law with his firm under the name of Eisenberg, Kletzke & Eisenberg; that this firm has a general practice which includes personal injury work, labor

work, real estate, probate, criminal, traffic, and various others.

5. That for several years your affiant has specialized in civil trial and labor law work; that he has done, since Alan David Eisenberg joined the firm in the summer of 1966 little, if any, criminal or traffic work.

6. That for some period of time prior to August of 1968 the affiant's trial practice and other interests have made it necessary to have over 40 persons employed in his office other than attorneys.

7. That Alan David Eisenberg, also a defendant in this matter, is 27 years of age and was graduated from Marquette Law School in the summer of 1966; that following graduation Alan David Eisenberg joined your affiant and your affiant's wife, Miriam Kletzke Eisenberg, in the practice of law.

8. That during this period since Alan David Eisenberg joined the firm he has been a married man and has maintained a separate residence from your affiant.

9. That since Alan David Eisenberg has been with the firm, he has worked almost exclusively in the traffic and criminal area; that your affiant does not see Alan David Eisenberg on a day-to-day basis; that he in fact has seldom worked on any cases with Alan David Eisenberg during the period that they have been together, and in fact spends very little time with his son in the practice of law; that your affiant practices in areas that are different than those in which his son practices; that during the spring and summer of 1968 he saw little or nothing of Alan David Eisenberg as he was in the course of preparing and defending a very extensive murder case in Milwaukee County.

10. That your affiant prior to August of 1968 except once or twice had not appeared in Judge Krueger's court for almost a year; that on that occasion he did appear at the special request of a client; that prior to that last hearing before Judge Krueger there had also been a prolonged period during which your affidavit had not been in Judge Krueger's court.

11. That your affiant last saw Judge Krueger prior to August 25, 1968, with possibly one exception approximately a year or more prior to August 25, 1968, when he made an appearance in a case against one Dale Dulberger.

12. That although your affiant had not prior to said time practiced before Judge Krueger, he had been made aware of Judge Krueger's actions in the courtroom through writings in the Milwaukee daily newspapers; that from these newspaper accounts and other attorneys, he had learned that Judge Krueger had many times been intemperate, irrational, and emotionally unstable; that he had learned among other things: that Judge Krueger had handled some forty odd cases in approximately the same amount of minutes; that he had refused people whom he had fined the time to raise their fines with the result that they had to go to jail; that he had learned through the news media that this had included pregnant women who wanted to go home and get the money; that Judge Krueger on a number of occasions had forfeited bail bonds because of the tardiness of the defendant regardless of circumstances; that he discharged a loaded gun in the courtroom; that Judge Krueger had refused on a number of occasions to honor affidavits of prejudice; that Judge Krueger had denied persons a right to counsel; that Judge Krueger had refused to permit a record made of the proceedings

before him in a number of cases; that Judge Krueger had shown disrespect of persons appearing before him and that Judge Krueger had engaged in the use of descriptive words which evidenced the fact that he was bigoted.

13. That your affiant had been advised by Alan David Eisenberg and by others that Judge Krueger had treated Alan David Eisenberg in a rude and intemperate way; that your affiant knew that Alan David Eisenberg had been upset and offended by Judge Krueger's treatment of others and of himself; and that he knew that Alan David Eisenberg desired to correct this situation.

14. That he knew at the time or he later learned that Alan David Eisenberg had complained of Judge Krueger's conduct to all possible sources available to attorneys who have complaints against the intemperate, irrational or arbitrary actions of a judge; that your affiant learned that all of these complaints were of no avail; that among the places that Alan David Eisenberg complained were to the Wisconsin State Court Administrator, Edwin Wilkie, the Chairman of Circuit Judges for Milwaukee County, Elmer W. Roller, and to a state legislative committee.

15. That your affiant knew that a client of Alan David Eisenberg's was advertising for complaints in the local newspaper for complaints against Judge Krueger under the name of a Commitee for a More Dignified Judiciary, and that your affiant knew this was for the purpose of securing the identity of persons who were interested in working for the recall of Judge Krueger; that your affiant is advised that Alan David Eisenberg was told that impeachment or removal were the only remedies possible to pur-

sue against an intemperate, irrational and emotionally unstable judge, that your affiant paid no attention whatsoever to the ad, had no conscious relationship with it, and considered it the business of Mr. Maxaculi.

16. That although your affiant knew of his son's concern over the fact that Judge Krueger was permitted to sit and continue in his arbitrary, intemperate and irrational way and although your affiant knew that his son was involved in attempting to secure a change in the conduct of the operation of this court your affiant was not involved in any of these matters in any way.

17. That your affiant's first contact with anything which involved Judge Krueger occurred on Friday, August 23, 1968, when your affiant returned home from trying a jury case in Elkhorn, Wisconsin, to find Attorney Edward Cameron waiting; that your affiant had had no prior contact with Attorney Cameron and his appearance was totally unexpected.

18. That because of the pleas and entreaties of Attorney Edward Cameron to make peace because the Judge was ill and tried to commit suicide, your affiant participated in preparing suggestions for a statement subject to Judge Krueger's approval and which Judge Krueger read to the public on Monday, August 26, 1968; that it was your affiant's understanding as a result of conversations had with Attorney Cameron and with Judge Krueger himself on Sunday, August 25, 1968, that Judge Krueger had come to a point in his life when he believed in the past operation of his court he had been intemperate, arbitrary and irrational and that he was now anxious to conduct his court in a manner that would bring dignity and justice to all

persons who were brought before him. That it was in pursuance of this decent goal that affiant made suggestions for the statement; that it was your affiant's belief that the statement was prepared and issued by Judge Krueger in pursuance of this aim.

19. The statement appointed a committee:

> ". . . to act as an advisory committee to assist me in concluding changes which are necessary to bring my traffic court in line with the ideals of justice and in understanding of the people of Milwaukee County as well as the esteemed members of the Milwaukee Bar."

That Judge Krueger said changes were necessary because he said an increased case load had lead his court:

> ". . . to an impossible situation where we have been confronted with tremendous case loads and where it has been increasingly difficult for us to provide adequate time which is necessary so that the rights of every defendant can be fully adjudicated."

That Judge Krueger said he had come to realize the need for the proper administration of law in his court as is evidenced by his statement:

> "The Eisenbergs, who have a large volume of work in these courts have forcefully called to my attention that the Traffic Court is probably the first encounter which the average citizen has with the workings of a court. It is their impression at the time they first enter Traffic Court, which creates their understanding of our court system and democracy at work through the administration of justice and which must frequently last throughout their lives."

20. That it was decided that in order to effectuate the decision made by Judge Krueger to make changes in

his court that he should be presented with the complaints which had been received by Gregorio Maxaculi, a client of the defendant Alan David Eisenberg, as a result of the newspaper advertisements run in the Milwaukee papers; that it was the intention and purpose of your affiant to participate with Judge Krueger and the other members of the committee in any discussion of the complaints that had been received, with an eye to helping him if he requested in determining the merit and what the appropriate action, if any, might be for the particular complaint; that it had been determined on Sunday, August 25, 1968, by Judge Krueger and the committee members that the committee would meet at a restaurant the following Friday evening for the purpose of accomplishing this fact; that it was understood that the committee was to be advisory only.

21. That the only time your affiant met with Judge Krueger prior to when Judge Krueger released the statement on Monday, August 26, 1968, was at the home of your affiant on August 25th; that it was your affiant's belief that the statement which Judge Krueger released was his own statement, motivated solely and wholly by his desire to change from his arbitrary, intemperate and irrational ways to improve his own public image and to bring his court into line with the traditions which are inherent in our American system of law.

22. That your affiant did not go to Judge Krueger's court on Monday, August 26, 1968, and did not in any way participate in the reading or hearing of the statement read, that your affiant was engaged in his own practice and was appearing that morning first in Judge Shaughnessy's court on a case that he was handling without fee and later in

Judge Raskin's court where he had to attend a pre-trial conference.

23. That at no time did he participate in any conspiracy with anyone to embarrass, harass or force Judge Krueger in any way to act against his will; that his only reason for any participation was the insistent request of Edward Cameron; that upon request he did what he felt was appropriate for him to do to assist Judge Krueger in his desire to change the operation of his court and to help the Judge because of his troubled condition.

24. That he denies that his son made the statements attributed to him in the complaint but alleges that whatever, if anything, his son said was his son's own doing, and was not part or parcel of any conspiracy between the two and further denies that whatever, if anything, his son said was with his approval or authority.

25. That he alleges he testified fully before the Bar Commission, that his wife and son in his presence testified fully before the Bar Commissioners, and that to his knowledge, nothing which he, his wife or son said, in any way established that there was any conspiracy or acting in concert to harass, embarrass or force Judge Krueger to act against his will; denies that there was any evidence given by himself, his wife or son that in any way tended to show or establish a conspiracy or agreement to do anything illegal or unprofessional.

26. Alleges that since August he has read various Milwaukee newspapers which have detailed facts surrounding Judge Krueger's actions before and after August 28, the day he took his own life; that he has attempted where possible to learn as much as he could about these same facts

from other sources; alleges that he knows of no evidence and states that there is no evidence that the State can have to establish that he and his son Alan David Eisenberg acted in any conspiracy to harass, embarrass or force Judge Krueger to act against his will.

27. That notwithstanding the fact that the other defendant in this case is your affiant's son, your affiant believes to be deprived of his own separate trial would substantially prejudice his ability to receive a fair trial for the following reasons:

A. In any case where there is a charge of unprofessional conduct made against a person, that person should have the right to have his conduct examined fully and fairly without consideration having to be given to what some other person may have done or said.

B. In a case where the allegations are so prejudicial as they are here, it is only fair to permit any person so charged to be tried by himself; that if required to defend against these allegations and be tried with another, where the alleged acts of that order can be introduced makes a defense impossible.

C. In a case where the allegations of the complaint raise such difficult fact questions, such as what caused Judge Krueger to take his own life, it would be impossible to a fair determination of those complicated questions as they related to anything your affiant did or said to have to at the same time consider what the effect of what another person similarly accused may have done or said.

D. The nature of the complaint in this case charging affiant and his son only by conclusions leaves affiant at a decided disadvantage in preparing and presenting a defense as he doesn't know what conduct of his or his son's the State may consider appropriate to establish these conclusions. To be required to stand trial with another, even his son, under these circumstances is doubly unfair as such a situation permits the State to present not only unspecified acts and deeds of affiant, but in addition unspecified acts and deeds of his son.

E. That it appears from the complaint that some of the evidence which is to be introduced are statements alleged to have been made by affiant's son, Alan David Eisenberg; that your affiant has no knowledge of these alleged statements; the complaint does not allege to whom the statements were made, nor when nor where the statements were made, what the circumstances of the conversation was, nor what other conversation may have been spoken; that it is impossible for affiant's son, Alan David Eisenberg, to properly prepare or present a defense to these statements absent allegations identifying this necessary information; to require affiant to be tried along with another who is by reason of the form of the complaint unable to be fairly tried is doubly prejudicial to your affiant.

29. That attached to this affidavit are copies of Milwaukee newspaper articles identified as Exhibits 1, 2, 3, 4, and 5, which are incorporated herein by reference; that these articles are attached to illustrate the manner and way

words and actions of one become associated and identified with another.

30. That Exhibit 1, an article of the Milwaukee Sentinel, of August 27, 1968, included the statement:

> "Judge Krueger, 63, said Monday he had been under 'tremendous pressure' from Alan Eisenberg."

That Exhibit 2, a Milwaukee Sentinel article of August 28, 1968, repeated this:

> "The controversial traffic court advisory committee was created Monday under pressure by a longtime foe, Atty. Alan Eisenberg, Krueger said."

That Exhibit 3, a Milwaukee Sentinel article of September 2, 1968, reported:

> "Krueger reportedly had complained to friends and associates of being under pressure from two critics, Atty. Sydney Eisenberg and his son, Alan, also an attorney."

That in Exhibit 4, the Milwaukee Journal of August 27, 1968, reported:

> "Alan Eisenberg reportedly had been claiming that he had something on Krueger."

That in Exhibit 5, the Milwaukee Journal, on August 28, 1968, reported:

> "The two critics, Atty. Sydney Eisenberg and his son, Alan, also an attorney, had claimed that they 'had something' on the judge, but refused to say what."

/s/ SYDNEY M. EISENBERG
Sydney M. Eisenberg

[Subscribed and sworn to by Sydney M. Eisenberg on January 14, 1969.]

[Exhibits 1 through 5, copies of newspaper clippings attached to the affidavit of Sydney M. Eisenberg, are not printed.]

* * *

ORDER [regarding oral argument of motion for discovery, etc., in Wisconsin Supreme Court—not printed.]

* * *

ORDER [—formal parts omitted.]

Alan David Eisenberg and Sydney M. Eisenberg having each served and filed herein individual motions "for separate trial"; having served and filed motion for discovery; for "change in referee and for opportunity to prepare defense"; to "docket, set briefing schedules and for oral argument regarding the legal questions raised by the pleadings in the above matter and enjoin referee from proceeding to hearing upon the factual issues pending the decision of this court on the legal questions"; the court having heard oral arguments on said motions and having considered briefs by both counsel thereon;

IT IS ORDERED that the motion to "docket, set briefing schedules and for oral argument regarding the legal questions raised by the pleadings in the above matter and to enjoin referee from proceeding to hearing upon the factual issues pending the decision of this court on the legal questions" is denied;

IT IS ORDERED that the motion for discovery is denied;

IT IS ORDERED that the individual motions of Alan David Eisenberg and Sydney M. Eisenberg "for separate trials" are denied; however, the complaint herein is deemed to state separate causes of action against Alan David Eisenberg and Sydney M. Eisenberg and the answer is considered an answer by the respective defendants in their individual cases; IT IS ORDERED that the actions are consolidated for the purposes of hearing.

IT IS ORDERED that the motion for change of referee is granted, Herbert A. Bunde is discharged as referee and George H. Young is appointed as referee.

Dated at Madison, Wisconsin, this 7th day of March, 1969.

By the Court:

/s/ Franklin W. Clarke
Clerk

(SEAL)

* * *

MOTION FOR CONTINUANCE OF HEARING AND TO RECONSIDER DEFENDANTS' CONSTITUTIONAL DEFENSE [—formal parts omitted.]

Now come the defendants, Alan David Eisenberg and Sydney M. Eisenberg, by their attorneys, Lawton & Cates and Richard L. Cates and John H. Bowers, and respectfully request this court to continue the hearing in the matter of discipline of the above named defendants now scheduled to commence on May 26, 1969, to July 21, 1969, and in support thereof respectfully allege and show unto the court as follows:

1. Annexed hereto and made a part hereof with the same force and effect as if set out in full is the affidavit of Attorney Richard L. Cates, one of the attorneys for the defendants in the above entitled matter.

2. Continuation of the hearing to July 21, 1969, is necessary in order to permit the defendants to continue their investigation to prepare for the cross-examination of the state's witnesses, which preparation, as more fully appears from the affidavit annexed hereto, is crucial to defendants' defense. Such investigation cannot be completed by the defense by May 26, 1969, the presently determined date for the hearing before the Referee, to enable it to defend effectively and to cross-examine the State's witnesses by May 26, 1969.

3. Defendants have retained expert psychiatric assistance to meet the state's proof and affirmatively to present medical proof and expert medical information concerning Judge Krueger's mental and physical condition and

the causes leading to his death. Such preparation is necessary in view of the state's allegation of the claimed relationship of defendants' conduct and Judge Krueger's death by his own hand.

Preparation of such medical proof is very time consuming and will not be completed during the period May 26, 1969, to June 16, 1969.

4. Irrespective of whether the defense is required to commence presenting its case in the period May 26 to June 16, 1969, the hearing cannot be completed in that period. Irrespective of a continuance of the entire matter, therefore, there will of necessity have to be a continuance to July 21, 1969 in order to complete the proceedings before the Referee.

5. The defendants, Alan David Eisenberg and Sydney M. Eisenberg, object to a split hearing and a split hearing will disadvantage them in their defense.

6. The Referee has available to hear this matter the period July 21 to September 15, 1969. If the entire matter is continued to on or about July 21, 1969, the entire proceedings before the Referee can be completed within the time available between July 21 through September 15, 1969.

7. A continuance of the May 26, 1969, hearing to commence on or about July 21, 1969, will not injure the State nor any other interests involved herein. The time for the continuance is relatively brief and would represent a continuance of only some 40 working days, excluding Saturdays and Sundays.

8. A continuance to July 21, 1969, might permit the Court to consider defendants' challenge to the constitutionality of the statute and complaint.

WHEREFORE, upon all of the foregoing, defendants move this Court for its order continuing the hearing scheduled to commence May 26, 1969, and ordering that it commence on or about July 21, 1969, before Referee Young and for reconsideration of defendants' motion to hear and decide defendants' challenge to the constitutionality of Sec. 256.29(1), (2), Stats., and the Complaint.

/s/ LAWTON & CATES
Lawton & Cates
Attorneys for Defendants

110 East Main Street
Madison, Wisconsin

AFFIDAVIT [—formal parts omitted.]

Richard L. Cates, being first duly sworn, on oath, deposes and says:

1. He is one of the attorneys representing Alan David Eisenberg and Sydney M. Eisenberg in these proceedings.

2. Professor George Young, the referee appointed to hear and decide this matter, has set May 26, 1969, as the date to commence taking testimony.

3. Your affiant is advised that Professor Young will next be available to hear this matter beginning July 21 and for an extended period of time until school begins again on September 15, 1969.

4. Counsel requests a continuance of the hearing to July 21, 1969.

Defendants Alan D. Eisenberg and Sydney M. Eisenberg desire one continuous hearing and object to a split hearing.

Unaided by discovery procedures and because of the complexity of the issues involved, the defense will not be prepared to properly defend or to put in its case during the period May 26 to June 16, 1969.

5. Affiant has frequently and consistently advised Referee Young and Attorney Regez that the defense cannot be sufficiently prepared to commence its case in the period between May 26 and June 16, 1969, due to the problems of preparation.

6. Due to difficult problems of proof, the defense cannot be ready to proceed on May 26, 1969.

In the course of its investigation the defense has received information which, if it can be proved, would discredit the credibility of important witnesses upon whom the state will rely. Because of the nature of the information which your affiant has received, investigation is difficult and time consuming; affiant will not be able to complete this investigation sufficiently by May 26, 1969, to permit him effectively to cross examine the state's witnesses. It is essential to the defense that your affiant have more time to finish this investigation.

The defense herein has retained the services of a psychiatrist to develop facts and expert testimony concerning the cause or causes for Judge Krueger's death. Preparation of such proof and the investigation of the pertinent facts is very time consuming. This is a medical fact question which involves a complete understanding of Judge Krueger's physical and emotional condition; your affiant has retained an eminent psychiatrist to assist him in the preparation of this matter at the time of trial.

The defense has been required to engage in the preparation of this defense without the aid or assistance of discovery and in a climate where many persons having information have refused to talk to your affiant; it is impossible for your affiant to be prepared to defend on this question by May 26, 1969.

7. Referee Young respects the defense problem but has denied the defense request for a continuance and wishes to proceed on the basis that the State put in its case and whatever else is possible by the defense and continue the matter to July 21, 1969.

Referee Young and the State and defense recognize that the hearing cannot be completed during the period May 26 through June 16, 1969, and that irrespective of whether or not the defense commences putting in its proof during that period of time, there will be necessity have to be a recess and a split hearing. The defendants object to a split hearing and desire one continuous hearing.

8. The trial of this matter in July of 1969 would not in any way prejudice the State of Wisconsin; the trial of this matter in July would permit the defendants to be better prepared; the trial of this matter in July would permit the case to be tried in one sitting; the trial of this case in July might also permit the court to give consideration to the merits of defendants' contention that the statute upon which the prosecution rests is unconstitutional.

9. That affiant makes this affidavit in support of a motion by the defendants for a continuance and for reconsideration of defendants' motion to consider the constitutionality of the statute and complaint.

Affiant alleges to the court that affiant cannot proceed to trial on May 26, 1969, and adequately defend the charges against defendants; that it is essential to a fair and adequate defense that defendants be given a continuance.

/s/ RICHARD L. CATES

[Subscribed and sworn to by Richard L. Cates on May 20, 1969.]

* * *

AFFIDAVIT IN OPPOSITION TO MOTION FOR CONTINUANCE [—formal parts omitted.]

RUDOLPH P. REGEZ, being first duly sworn, deposes and states:

1. That he is counsel for the Board of State Bar Commissioners and has represented that Board from the inception of the instant litigation and still represents said Board.

2. Deponent further deposes and states that a complaint against the defendants herein was prepared by your deponent at the direction of the Board and filed with this Court on September ...., 1968, and that the same was duly served on the defendants on ....; that this Court issued an order to answer which was served with the complaint on said defendants requiring the defendants

to answer within twenty days; that defendants, after filing herein two successive sets of motions, all of which were denied, filed an answer on the 16th day of December, 1968, the same being over 75 days after service of the complaint; that nearly eight months have elapsed since the service of the complaint.

3. Deponent further deposes and states that on or about December 20, 1968, this Court appointed the Hon. Herbert A. Bunde, Referee to hear said matter, but upon the filing of an Affidavit of Prejudice by defendants against said Referee, Hon. George H. Young was appointed Referee; that immediately upon the appointment of George H. Young, your affiant requested that he set a trial date, and it was requested by affiant that trial be set to commence during the spring vacation of the University of Wisconsin Law School, but that defense counsel objected to that date as it interfered with his personal family vacation plans, and affiant, so as not to inconvenience counsel, agreed that the trial be commenced at a later date, and for that reason, by agreement at a pre-trial conference held by Referee George H. Young, attended by affiant, Richard Cates and John Bowers, counsel for defendants, it was agreed that the trial date would be fixed as of May 26, 1969; that the aforementioned pre-trial conference was held at the office of Hon. George H. Young, at the University of Wisconsin Law School on Wednesday, March 12, 1969.

4. Deponent further deposes and states that relying upon the trial date agreed upon, his office schedule has been built upon that date, and that he has arranged his private law practice accordingly, adjourning many matters because of the fixed trial date; that he will not be available for the

full period July 21 to September because of commitments heretofore made by him, all in reliance upon a trial date of May 26, 1969.

5. Deponent further deposes and states that subsequent to said pre-trial conference, defendants, as plaintiffs, filed an action in the United States District Court for the Western District of Wisconsin, a copy of their complaint and supporting statements being attached hereto.

6. Deponent further deposes and states that your affiant and Warren Resh, Special Counsel, appeared on behalf of the defendants in the District Court action, filing a motion to dismiss the complaint, which motion was heard by Hon. James Doyle, District Judge, on Friday, March 28; that said Judge issued an order in said matter on Monday, May 19, a copy of which reached this affiant this date, denying defendant's motion as to Counts 1, 2 and 3 and granting the same as to Counts 4 and 5 of Plaintiffs' Complaint in the Federal Court action; that, as affiant believes, the effect of said order is to deny the defendants in the disciplinary proceeding the right to a trial of the Federal Court action prior to the State Court disciplinary proceeding being heard.

7. Deponent further deposes and states that the basic facts making up the disciplinary proceedings are relatively simple and long known to the defendants; that the defendants have had since September of 1968 within which to prepare their defense in this proceeding and have had specific knowledge of a trial date since March 12, 1969.

8. Deponent further deposes and states that relying on the trial date he has issued subpoenas for 16 witnesses; that he has interviewed witnesses and made complete

preparation for trial, all of which time, expense and effort will be nullified if defendants' motion for continuance be granted.

9. Deponent further deposes and states that the Referee has assured the parties that there would be trial time of approximately 18 days at the time scheduled (starting May 26, 1969) and that he knows of no reason why the matter cannot be concluded during that period of time, and that he is of the opinion and verily believes, barring further delaying motions or activities on the part of the defendants, that the State's case can be presented in 4 days; that counsel for defendants were assured by affiant that if any evidence be offered at the trial which comes as a surprise to the defendants, he would stipulate to a reasonable delay for defendants to endeavor to meet such evidence and that the Referee stated he would order a continuance in such event.

10. Deponent further deposes and states that further delay is not justified and that to delay further makes the proof of the allegations of the complaint more difficult and with the further possibility that some of the witnesses will be gone during the period mentioned by reason of summer vacations and otherwise.

11. Deponent further deposes and states that because of the delay already sustained, one of the witnesses who would have been called is now deceased.

Dated May 20, 1969.

/s/ RUDOLPH P. REGEZ

[Subscribed and sworn to by Rudolph P. Regez on May 20, 1969.]

* * *

[ORDER.]

Madison, May 21, 1969

To Lawton & Cates
Attorneys at Law
110 East Main Street
Madison, Wisconsin 53703

Mr. Rudolph P. Regez
Attorney at Law
1502—Tenth Street
Monroe, Wisconsin 53566

Sir:—The Court today announced decision in your case as follows:

STATE OF WISCONSIN v. ALAN DAVID EISENBERG and SYDNEY M. EISENBERG, State No. 107.

IT IS ORDERED that the defendants' "Motion for continuance of hearing and to reconsider defendants' constitutional defense" be, and the same is hereby denied.

Respectfully yours,

FRANKLIN W. CLARKE
Clerk of Supreme Court

* * *

AFFIDAVIT [—formal parts omitted.]

RUDOLPH P. REGEZ, being first duly sworn, deposes and states:

That he is counsel for the plaintiff in the above matter and in that capacity makes this affidavit in connection with an Order to Show Cause requested by plaintiff this date, asking that the Supreme Court order that the trial of this proceeding continue forthwith, and in support of such request states:

That the trial in the above matter commenced at Milwaukee, Wisconsin on May 26, 1969 and has continued for twenty-two days, the last trial date being August 1, 1969. That the trial commenced before Referee George H. Young on May 26, 1969 and continued through June 13, 1969 and was then adjourned to July 21 because of the Referee's Law School commitments.

Deponent further deposes and states that throughout the proceedings there has been pending in the United States District Court for the Western District of Wisconsin, an action wherein the Board of State Bar Commissioners and the Referee herein are defendants wherein defendants in this action are plaintiffs, and which action asks that Section 256.29(1) be determined unconstitutional and asking for an injunction restraining the trial of this action. That a three judge court was convened and heard arguments in the matter on July 9 and thereafter issued an order denying a temporary restraining order enjoining the proceedings and permitting the same to continue to their conclusion.

Deponent further deposes and states that the plaintiff rested its case against the defendants on Thursday morning, July 31, at approximately eleven o'clock A.M., and that thereafter defendants made oral motions including a motion that the Referee certify certain questions to the Supreme Court which questions, as affiant understands, are substantially as follows:

(1) What are the limits of permissible speech activity? (With reference to a lawyer's speech activity in relation to a sitting judge, and particularly defining whether or not defendants' activities as disclosed in this proceeding are speech activities protected by the Constitution)

(2) To what extent can activities not alleged in the complaint be considered in determining whether or not defendants are guilty of unprofessional conduct?

Deponent further deposes and states that on August 1, 1969 the Referee granted defendants' motion to certify the above questions to the Supreme Court, but as deponent believes, the principal purpose of such certification is to determine which part of defendants' activities as disclosed by the record are free-speech activities protected by the First Amendment to the United States Constitution.

Deponent further deposes and states that as of the 13th day of June, twelve volumes of testimony consisting of 1,411 pages, have been compiled; that this voluminous record does not include a transcript of the proceedings for the ten days covering the trial period July 21 through August 1, all of which will consist of several hundred additional pages.

Deponent further deposes and states that if a certification of the questions to the Supreme Court be permitted, such certification will serve to unreasonably delay the proceedings, already long delayed, and further that it will commit this court to the laborious process of reviewing the record at this time in order to determine the questions certified.

Deponent further deposes and states that the Referee will be required to resume his Law School duties in September of 1969 and that if the taking of testimony is not completed during the month of August the matter will be further delayed and subsequently tried under such circumstances as to impose unreasonable burden upon plaintiff and creating substantial additional expenses and extend the time at hearing unduly, all of which will bring little credit of respect to the proceedings.

Deponent further deposes and states that this action is an original proceeding before the Supreme Court and that the trial is a reference with the Referee acting as a factfinder. That this court has previously heard the defendants at length and on several occasions through various motions and has overruled their demurrer, motion to strike and other motions but at the same time expressly reserving to itself all legal questions and the determination thereof.

Deponent further deposes and states that if a certification is permitted at this stage of the proceedings, such order will constitute a reversal of this court's previous rulings and orders and can serve no purpose but to create greater confusion and extreme delay.

Deponent further deposes and states that the Referee ruled that he will certify the questions but that the scope of his order granting the same has not been fully determined, but that a conference between the Referee, counsel for defendants and deponent was scheduled for August 6, 1969 at 1:30 o'clock P. M., at which time Richard Cates, Esq., counsel for defendants, was to present a proposed order.

Deponent further deposes and states that, as he is informed, it will be impossible to procure a quorum of this court for a substantial period after Tuesday, August 5, and prior to September 1, and for that reason the matter is presented at this time with a respectful request that an order be entered requiring that the proceedings be immediately reconvened and continued until the testimony is complete.

Further deponent sayeth not.

Dated this 2nd day of August, 1969.

/s/ RUDOLPH P. REGEZ
Rudolph P. Regez

[Subscribed and sworn to by Rudolph P. Regez on August 2, 1969.]

* * *

ORDER TO SHOW CAUSE [—formal parts omitted.]

From the affidavit of RUDOLPH P. REGEZ, counsel for plaintiff above named,

IT IS ORDERED:

That the defendants above named show cause, if any they have, before the Supreme Court, in the Supreme Court Room, Capitol Building, Madison, Wisconsin, on the 5th day of August, 1969 at 11:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be entered requiring that the trial of this proceeding be immediately reconvened by Referee George H. Young, and continued to its conclusion and without further delay.

Dated at Madison, Wisconsin this 2nd day of August, 1969.

/s/ E. HAROLD HALLOWS
Chief Justice Supreme Court
of the State of Wisconsin

* * *

DECISION AND FINDINGS [OF TRIAL REFEREE—formal parts omitted.]

The State commenced its proof on May 26, 1969, continued presenting its proof over a five week period, and rested its case on Thursday, July 31, 1969.

Upon the conclusion of the State's case, the defense made the following motions:

1. For a finding of fact by the referee that there is insufficient proof to establish a causal relationship between Judge Krueger's emotion and mental condition and any word or deed the proof may have shown either Sydney or Alan Eisenberg, either individually or in concert, may have done.

2. If the referee makes the requested finding, then to strike all of the testimony which was offered to show Judge Krueger's state of mind and his emotional and mental condition.

3. For a finding of fact that neither Sydney or Alan Eisenberg, acting either individually or in concert, were guilty of any extortion.

4. In case the preceding motions were granted, for the referee to certify to the Wisconsin Supreme Court because it had reserved these legal questions to itself, the following questions which must of necessity be answered before the defendants can know what to defend against and before the referee can know which facts he can legally consider in making his recommendation:

a. What are the limits of punishable conduct in the light of the United States and Wisconsin Constitutions guaranteeing individuals the right of free speech.

b. Can activity not covered in the complaint be considered a basis for the imposition of discipline.

5. To dismiss the complaint for lack of procedural due process.

6. To dismiss the complaint because all the evidence established is protected speech activity under the United States and Wisconsin Constitutions.

The referee has listened to all of the State's witnesses, has heard the arguments of counsel, and based on all of the evidence, the referee finds as a fact that the proof offered by the State failed to establish a causal relationship between Judge Krueger's possible mental and emotional illness and any word or conduct by either of the defendants.

From the evidence there were many factors affecting Judge Krueger emotionally, and it is impossible to measure what effect, if any, anything that the defendant did or said had on the emotional and mental condition of Judge Krueger.

The referee has concluded that the only thing for which the defendants may be disciplined is for what they individually did or said. To select any particular thing and say it had any specific effect on Judge Krueger's suicide would in the judgment of the referee be impossible. It is the decision and judgment of the referee that the evidence offered by the State is insufficient to establish such a causal relationship.

The referee permitted the State to introduce evidence relating to Judge Krueger's emotional and mental condition because the causal issue was in the pleadings. Because the State's proof is insufficient to show a causal relationship, the referee is striking all the proof that related to Judge Krueger's emotional and mental condition and is ruling that the defense will not be permitted to offer evidence of this nature as that question is no longer in the case.

The defendants have also requested the court to make a finding that there is insufficient evidence to establish that either of the defendants, Sydney or Alan Eisenberg, either individually or in concert, committed any act of extortion.

The referee so finds.

Because of the above findings of fact the referee is of the opinion that the only conduct for which the defendants may be disciplined is speech activity which might be deemed unprofessional or in violation of the attorney's oath. Because of this fact, it is essential in the opinion of the referee that there be some legal determination made as to what speech activity is considered protected by the United States Constitution and Wisconsin Constitution, and what activity is unprotected. The resolution of this question is not only essential to the referee, but is essential to the defendants who are now required to present their defense. It is essential that there be guidelines set showing what they may be disciplined for in order that they may prepare their defense. The defendants in their individual answers raise the defense that all of their conduct is protected. In its appointment the Wisconsin Supreme Court reserved this legal question to itself. It is the opinion of the referee that this question is now ripe for determination, and for that reason the referee is certifying the following question to the Wisconsin Supreme Court:

> What are the limits of punishable conduct in the light of the United States and the Wisconsin Constitutions securing the right of individuals to fully express themselves.

The State in the presentation of its proof offered evidence of conduct which was not specifically referred to in the complaint filed against Sydney and Alan Eisenberg. The referee concludes that he must be advised on whether or not the proof of these facts may constitute actionable conduct in the light of the due process notice requirements of the United States and Wisconsin Constitutions.

This question was also raised by defendants in their individual answers and was reserved to the court at the time of its appointment of the referee. It is essential in the opinion of the referee that this legal question be answered in order to permit the referee to make the appropriate finding upon which a recommendation can be made and also in order to permit the defense to know what it must defend against and for that reason the following question is certified to the Wisconsin Supreme Court:

> Can activity not covered in the complaint be considered a basis for the imposition of discipline. If so, what procedural limits or safeguards must be imposed to assure defendants due process.

The motions by the defense to dismiss for lack of due process and because the conduct is protected speech activity under the United States and Wisconsin Constitutions are denied because the Supreme Court has reserved jurisdiction on these questions.

These motions involve the application of legal principles which have been reserved by the court for application in this case.

Dated this 4th day of August, 1969.

/s/ GEORGE H. YOUNG
George H. Young

Referee

* * *

ORDER [approved by trial referee regarding questions certified—not printed.]

* * *

AFFIDAVIT [—formal parts omitted.]

RICHARD L. CATES, being first duly sworn, on oath, deposes and says:

1. He is one of the attorneys representing the defendants and has been responsible for the defense of this action, and he makes this affidavit to support the decision of Referee George H. Young to refer certain questions to the Wisconsin Supreme Court for determination.

2. The State has called 22 witnesses who have given testimony over a five week period. The State rested its case on Thursday, July 31, 1969. At the conclusion of the State's case, the Referee made a finding that there was not sufficient evidence to show a causal relationship between the words or conduct of the defendants and the emotional and mental condition of Judge Krueger. That in addition the Referee made a finding that the evidence would not support the conclusion that the defendants were guilty of any act of extortion.

3. The Referee in his decision indicated that there remained only speech activity for which the defendants might be disciplined. In order for the Referee to make a finding of fact and recommendations, and in order for the defense to know what proof it should defend against, the Wisconsin Supreme Court must at this time make a determination as to what speech activity is protected and what is not, and whether conduct not alleged in the complaint can result in discipline to the defendants.

4. Although there has been 22 witnesses called and five weeks of trial, the defendants and Referee still do

not know upon what conduct the State will rely in order to recommend discipline.

5. The complaint is vague and included only broad conclusions. Attorney Rudolph Regez, counsel for the State, made no opening statement advising the Referee what his proof was to be or even what the theory of his case was to be.

6. The State in the complaint took the position that the defendants were guilty of causing Judge Krueger emotional upset which culminated in his taking his life. After the proof was in and the defense moved for the finding that it did, Attorney Regez said that this allegation in the complaint was not a charge, but was there for informative purposes only, showing what happened.

7. Thereafter when it appeared the Referee was going to make a determination on the subject, Attorney Regez stated that it was the State's position that although defendants may not have caused the condition, their misconduct was in dealing with a man they knew or should have known was mentally sick or ill. This was the first time the defense was advised by any manner or means that this was a contention of the State. This was the first time the Referee had heard any such idea expressed. The Referee had previously advised Attorney Regez that he had believed the State was alleging the defendants' conduct had caused Judge Krueger emotional upset, causing him to take his own life.

8. That in the discussions between the State, the defense, and the Referee prior to the Referee determining that he should certify the questions which he has to the Wisconsin Supreme Court, your affiant tried to get Attor-

ney Regez to state what he relied upon to discipline the defendants and further whether he was going to rely upon all of the conduct on which evidence was produced, even though a substantial number of situations were not covered in the complaint. Attorney Regez refused to identify what he would rely upon and said that he felt everything could be considered and that the totality of the conduct could be looked at and judged. Attorney Regez, although asked several times by your affiant, refused to advise either the Referee or the defense what speech activity he considered protected and which he considered unprotected.

9. In the hearing before Referee Young on the defense motions made after the State rested, Mr. Regez's chief arguments in opposition were his personal inconvenience, that a finding and certification at this time would amount to a failure by the Referee to do his duty, and the fact that it would be inconvenient to continue the matter after the Referee was again teaching. The Referee indicated that although he would be returning to teaching in September, he would be able to continue the hearing, holding it in two to two and one-half day sessions. The defense indicated that they would be willing to accommodate the Referee and State, and at least offer the testimony of the defendants themselves and of their immediate families in Madison.

10. Your affiant was present when Attorney Regez appeared before the Three Judge Federal Court and answered questions relating to the theory of his case. In that appearance Attorney Regez gave several bases for the action against the defendants: violation of the attorney's oath under Sec. 256.29, Wis. Stats.; violation of an unspecified common law standard of unprofessional conduct; and finally, for a violation of a non-enumerated section of the ca-

nons of ethics. In none of Mr. Regez's responses did he even tell what specifically the defendants had done wrong. He merely said they were disrespectful or acted unprofessionally. Attorney Regez took the position that the defendants could be disciplined for violation of their attorney's oath relating to disrespect, stating that the Wisconsin case of *In Re Cannon* (1932), 206 Wis. 374, did not apply because Mr. Cannon made his false statements charging malfeasance during a period when his attorney's license was suspended.

11. All of the proof offered which is left to judge is speech activity. The extortion and conduct resulting in death charges are out. The defense does not know which of the proof offered by the State is protected and which is not. The Referee does not know. It is apparent from the varying positions taken by the State, and from the State's refusal to specify what proof it is relying on that the State does not know what conduct defendants should be disciplined for.

12. This case has labored on for five weeks. It has been extremely trying on everyone concerned. The purpose of the motions by the defense and it is believed the decision, findings and question certification by the Referee were for the purpose of securing decisions on law reserved to the court, all of which would materially shorten the defense and might well dispose of the entire lawsuit.

13. Affiant believes that now that the extortion and conduct causing death have been removed from the case, and all that is left is speech activity, the case might well be disposed of for one or both of the defendants on the authority of *In Re Cannon*, which affiant believes is applicable to these defendants.

14. That affidavit is submitted in support of the determination made by Referee George H. Young, as to procedure to be followed in this matter.

/s/ Richard L. Cates
Richard L. Cates

[Subscribed and sworn to by Richard L. Cates on August 5, 1969.]

* * *

[ORDER.]

Madison, August 5, 1969

To Lawton & Cates, Attorneys
110 East Main Street, Madison
Attorney Rudolph P. Regez
1502—10th Street, Monroe

Prof. George H. Young
Madison

Sir:—The Court today announced decision in your case as follows:

State of Wisconsin v. Alan David Eisenberg and Sydney M. Eisenberg, State #58

IT IS ORDERED that the petition of the Board of State Bar Commissioners be and the same is hereby granted and, pursuant to our order of March 7, 1969, the determination of legal and constitutional questions shall abide the Referee's filing of findings of fact and recommendations following the completion of the hearing as heretofore directed by this Court.

No opinion filed.

Respectfully yours,

Franklin W. Clarke
Clerk of Supreme Court

* * *

MOTION TO OPEN THE RECORD TO TAKE NEWLY DISCOVERED EVIDENCE [—formal parts omitted.]

NOW COMES Alan D. Eisenberg and Sydney M. Eisenberg, defendants above named, by their attorneys, Lawton & Cates, and Richard L. Cates and John H. Bowers, and moves the Referee to open the record to take newly discovered evidence and in support thereof shows unto the Referee as follows:

1. An Assistant District Attorney of Racine County, Mr. Paul D. Lawent, has made an affidavit and he will testify to the fact that on July 30, 1968, while he was on official business observing Judge Krueger's courtroom in Milwaukee, Judge Krueger turned toward Assistant District Attorney Lawent and said words to the effect ". . . because of problems that will be caused by the uniform traffic citation, I am considering appointing an advisory board to this court consisting of Sydney M. Eisenberg, Alan Eisenberg and Ed Cameron."

2. The testimony of the said Assistant District Attorney Lawent is corroborated by public records of expense vouchers which show that said Paul Lawent was in Milwaukee on July 30, 1969, and by the testimony of four

other persons who heard Judge Krueger refer to his considering an advisory committee.

3. Counsel for the defendants did not learn of these facts until sometime in the week of November 16, 1969, or thereafter and has acted with all possible speed to inform the Referee and counsel for the State Bar and to investigate them.

4. This evidence is material and very significant to the defendants' defense. To deny the relief sought will work to the prejudice of the defendants.

5. To grant the relief sought here will not cause delay to these proceedings nor prejudice the rights of the plaintiff, State Bar of Wisconsin.

6. Annexed hereto and made a part hereof with the same force and effect as though set out in full, in support of this motion, are the affidavits of Richard L. Cates, Attorney, Edward Grosse, investigator for Lawton & Cates and a copy of the affidavit of Assistant District Attorney Paul Lawent.

Dated at Madison, Wisconsin, this 16th day of December, 1969.

LAWTON & CATES

By: /s/ JOHN H. BOWERS
John H. Bowers, Attorney
Attorneys for Defendants

AFFIDAVIT [—formal parts omitted.]

RICHARD L. CATES, being first duly sworn on oath deposes and says:

1. He is an attorney for the defendants in the above proceeding and makes this affidavit for and in their behalf in support of the motion to open the record herein to take newly discovered evidence.

2. Affiant first learned during the week of November 17, 1969, or thereafter, that Assistant District Attorney Paul D. Lawent of Racine County had informed Alan Eisenberg that on July 30, 1968, Lawent and others had been observers in Judge Kruger's courtroom and that Judge Krueger had on that date indicated that he was going to appoint Alan and Sydney Eisenberg and Edward Cameron to an advisory committee to study the effect of the uniform traffic citation on procedures. Thereafter, and on or about November 26, 1969, affiant received a copy of an affidavit signed by Mr. Paul D. Lawent, Assistant District Attorney for Racine County. Such copy is annexed hereto and made a part hereof. In said affidavit, Assistant District Attorney Lawent recites that he was in Judge Krueger's courtroom on July 30, 1968, and heard Judge Krueger recite that ". . . because of problems that will be caused by the uniform traffic citation, I am considering appointing an advisory board to this court consisting of Sydney M. Eisenberg and Alan Eisenberg and Ed Cameron".

Upon being supplied with this affidavit, affiant requested his investigator, Mr. Edward Grosse, to investigate the background and facts surrounding the events referred to in Assistant District Attorney Lawent's affidavit. Your affiant and investigator Grosse acted with all possible speed in investigating said facts and in determining the merit and materiality of said information to these proceedings. A summary of the results of that investigation is set forth in the affidavit annexed hereto and signed by Mr. Edward Grosse.

3. Affiant and John H. Bowers, who is co-counsel with affiant in this matter had no prior knowledge of the facts set forth in the affidavit of Assistant District Attorney Paul D. Lawent. Affiant acted with all deliberate speed in investigating the facts surrounding this information and in bringing this matter to the attention of Referee Young and to counsel for the State Bar, Mr. Rudolph Regez.

4. This motion is not made for purposes of delay nor will granting the motion to take the additional evidence cause any delay to these proceedings. Affiant believes that all relevant testimony concerning this matter can be taken in one day or less. The taking of said testimony will not delay or in any way postpone the schedules already established for oral argument and for briefing and submission of this matter to the Referee for his consideration.

The matter is of considerable materiality and importance to the issues posed in these proceedings. To open the record for the purpose of taking this proof will not in any way prejudice the interests of the State Bar of Wisconsin, but to deny the motion will deny to the defendants relevant, material and significant testimony to their prejudice.

/s/ Richard L. Cates
Richard L. Cates

[Subscribed and sworn to by Richard L. Cates on December 16, 1969.]

AFFIDAVIT [—formal parts omitted.]

EDWARD GROSSE, being first duly sworn on oath deposes and says:

1. He is an investigator in the employ of the law firm of Lawton & Cates.

2. On or about November 26, 1969, affiant was given a copy of an affidavit signed by Mr. Paul D. Lawent, the Assistant District Attorney for Racine County. A copy of said affidavit is annexed to this motion. In the affidavit of Assistant District Attorney Lawent, the Assistant District Attorney recited that on July 30, 1968, he had been an observer in Judge Krueger's courtroom in the City and County of Milwaukee and that on that date while sitting in the jury area, Judge Krueger turned his head toward Assistant District Attorney Lawent and said words to the effect that ". . . because of problems that will be caused by the uniform traffic citation I am considering appointing an advisory board to this court consisting of Sydney M. Eisenberg, Alan Eisenberg and Ed Cameron". That the said affidavit of Lawent was delivered to this affiant by Mr. Richard L. Cates, attorney for Alan and Sydney Eisenberg, with

the request that affiant investigate the subject matter of Assistant District Attorney Lawent's affidavit.

On December 4, 1969, affiant went to Racine to make the requested investigation. Affiant first questioned Assistant District Attorney Paul Lawent. Lawent advised affiant that he had been in Judge Krueger's courtroom on July 30, 1968. That others present at the time were Judge Richard G. Harvey of Racine County; Officer Mel Hogopian, City Police Officer, Officer George Povkovich, City Police Officer; and Officer Nile Fuller of the Racine County Sheriff's Department; Miss Jane Sykes, Court Reporter for Racine County and Miss Sarah Asdigian, the Court Clerk.

District Attorney Lawent reaffirmed the facts set forth in his affidavit regarding what Judge Krueger had said on July 30, 1968.

3. After questioning Assistant District Attorney Lawent, affiant checked the official county records and specifically the expense vouchers there on file submitted by the above named individuals. Said expense vouchers show and establish that the above named individuals were all in Milwaukee County on July 30, 1968, and confirmed the date referred to in Lawent's affidavit.

4. After checking the expense vouchers, affiant discussed this matter with Judge Harvey, the three police officers above named, the clerk and Court reporter. All of these individuals recall the fact that Judge Krueger on the day in question, followed a system whereby he would make a determination of guilt in speeding cases without regard to and without determining the number of miles per hour over the speed limit with which the defendants were charged. All of these named individuals recall that

Judge Krueger commented as to whether or not he would be able to continue this practice after the uniform traffic citation went into effect.

5. The three named police officers and court reporter each recalls that after Judge Krueger made his statement concerning the effect of the uniform traffic citation, he recited that he was thinking about appointing an advisory committee which would concern itself with what changes would be necessary in procedures following the institution of the uniform traffic citation.

The above named court reporter specifically recalls that he then named several people he might consider on the committee; the named court reporter does not recall the names and did not know the names mentioned at the time because she was not familiar with any of them.

6. Assistant District Attorney Lawent advised affiant that he has a specific recollection of the names used by Judge Krueger whom Judge Krueger said he was considering appointing to the advisory committee because he recalled that when he heard the name Alan Eisenberg mentioned he (the Assistant District Attorney) reacted unfavorably. He wondered why Judge Krueger would appoint such a young man to an advisory committee. Assistant District Attorney Lawent had been a Marquette University law student at the time Alan Eisenberg was a student.

Assistant District Attorney Lawent informed your affiant that he (Lawent) is not related to Alan or Sydney Eisenberg; he knew Alan Eisenberg at Marquette University; Alan Eisenberg was one year ahead of Lawent in Law School; he (Lawent) has had no social contacts with the

Eisenbergs; he has had no church contacts with the Eisenbergs; he has had very few court cases in which Alan Eisenberg appeared on the other side.

7. Your affiant discussed Assistant District Attorney Lawent with Judge Harvey of Racine. Affiant specifically asked whether or not Judge Krueger had made the statement concerning appointing the Eisenbergs to the advisory committee. Judge Harvey said that he did not recall Judge Krueger mentioning names, but Judge Harvey recited that he felt that Assistant District Attorney Lawent is a very responsible and reliable individual and that if he said he heard such a remark in the courtroom that he (Judge Harvey) believes that it was said by Judge Krueger.

/s/ EDWARD G. GROSSE
Edward G. Grosse

[Subscribed and sworn to by Edward G. Grosse on December 16, 1969.]

AFFIDAVIT [—formal parts omitted.]

PAUL D. LAWENT, being first duly sworn on oath, deposes and says:

1. That he is twenty-six (26) years old, and resides at 1802 Grange Avenue, Apartment 207, in the City and County of Racine, State of Wisconsin;

2. That he is an Attorney-at-Law licensed to practice law in the State of Wisconsin, and has been so licensed by the Supreme Court of Wisconsin since June 5, 1967, and was graduated from the Marquette University Law

School, in the City and County of Milwaukee, State of Wisconsin, on June 4, 1967;

3. That he is an Assistant District Attorney in Racine County, Wisconsin, and has been so employed since June 24, 1968;

4. That on July 30, 1968, your affiant and others were observers in Judge John E. Krueger's Courtroom in the City and County of Milwaukee, State of Wisconsin;

5. That on that date, your affiant, while sitting in the jury area of the above named courtroom, observed Judge John E. Krueger turn his head toward your affiant, and say words to the effect that "because of problems that will be caused by the uniform traffic citation, I am considering appointing an advisory board to this Court consisting of Sydney M. Eisenberg, Alan Eisenberg, and Ed Cameron";

6. That the above quote is not the exact words recalled by your affiant, but is the essence of Judge Krueger's statement and that the above named are positively and absolutely the ones used by Judge Krueger;

7. That your affiant has had experience in observing persons as he has practiced as a journalist and a lawyer, and based on his experience, your affiant believes that Judge Krueger was not in a state of fear or distress when he made the above remarks, but rather appeared to be relieved that such a board could be appointed to assist him;

Dated at Racine, Wisconsin, this 24th day of November, 1969.

/s/ Paul D. Lawent
Paul D. Lawent

[Subscribed and sworn to by Paul D. Lawent on November 24, 1969.]

* * *

FINDINGS, REPORT AND RECOMMENDATION OF REFEREE GEORGE H. YOUNG [—formal parts omitted.]

To The Honorable, The Supreme Court of the State of Wisconsin:

I respectfully submit herewith my report as referee in the above entitled action, having been appointed by order of this Court to conduct a hearing and report findings of fact and recommendations.

In summary, my findings of fact and recommendations as to each defendant are:

1. As to Sydney M. Eisenberg, I find that the State has failed to prove by clear and satisfactory evidence that this defendant was guilty of unprofessional conduct, as set forth in the State's complaint and in the brief filed with me by the State, and I recommend that the complaint against him be dismissed.

2. As to Alan David Eisenberg, I find that the State has failed to prove by clear and satisfactory evidence that this defendant was guilty of any one of the specific charges against him as set forth in the State's complaint and in the brief filed with me by the State; but I also find that the overall pattern of his conduct, as shown by the complete record, is such as to warrant a reprimand by the

Court and an admonishment to conduct himself in a professional fashion at all times in the future.

My detailed report, the findings of fact on the specific charges and comments follow.

Summary of Proceedings

This action was commenced by the presentation of a complaint pursuant to Sec. 256.28(8) Stats. and an order to answer served on the defendants on October 3, 1968. The defendants duly answered and by order of this Court the matter was referred to me as Referee to report findings of fact and recommendations.

The hearing started in Milwaukee on May 26, 1969 and ended, after interruptions, on August 20, 1969. Mr. Rudolph Regez appeared for the State. Both defendants were represented by Mr. Richard L. Cates and Mr. John H. Bowers. In addition, Sydney Eisenberg represented Alan Eisenberg and Alan Eisenberg represented Sydney Eisenberg. Oral argument was heard on December 18, 1969. After oral argument was heard, both parties submitted briefs to the referee.

Introduction

The assignment to act as referee in this matter proved to be one of the most difficult I have ever undertaken. The testimony consumed over thirty days and produced a record of 4,050 pages which is full of conflicting testimony, charges and counter charges, efforts at impeachment and rehabilitation, and evidence raising inferences and inuendos that at best lead to dubious conclusions. There is also much repetition in the record. I will accept responsibility for some of this; but do not apologize because I felt that the defendants, who had a great deal at stake, should be allowed the utmost latitude in the tactics and methods with which they chose to present their defense.

I have given much thought as to how to structure this report so that it would be most useful to the Court. I have regretfully concluded that I cannot submit a brief report, because if I am to fulfill my obligation, I must analyze the evidence regarding the conduct of the defendants on many occasions and determine, as best I can, whether their conduct, viewed individually, collectively or concertedly warrants the imposition of professional discipline.

The following analysis is based on the assumption that, in order for me to find that the defendants were guilty of unethical or unprofessional conduct, I must be persuaded that such is the fact by clear and satisfactory evidence. *State vs. Treis,* 245 Wis. 479.

I report my thoughts and conclusions on the various incidents and activities involving the defendants in the order in which they were presented in the brief submitted to me by the State. The hearing produced a great deal of evidence which seemed at the time to be of possible significance, but is not now utilized by either side. I have not felt it necessary in general to go beyond an analysis of the charges presented in the State's brief and the defense's answer to those charges.

I.

ANALYSIS OF THE EVIDENCE AS TO EACH OF THE STATE'S CHARGES.

1. Charge of defendant's circulation of statements that the Judge was guilty of conduct for which a criminal warrant could be issued.

The plaintiff, in support of this charge, relies primarily upon the testimony of Milwaukee Sentinel reporter, Ronald Haase. The significant portion of Haase's testimony begins with a conversation he had with Alan Eisenberg on August 22, 1968, in the press room of the Safety Building ing. Haase's account is that he had approached Alan for his reaction to a radio program that had apparently been critical of Judge Krueger. That led Alan into a discussion of his desire to have the Judge removed and the three procedures that might be used to bring this about, impeachment, recall and a private investigation which might uncover facts which would result in the issuance of a felony warrant and successful prosecution of the Judge. Alan felt that impeachment and recall were either impossible or impractical and that the best course would be a private investigation. Haase then said Alan told him, "I predict within sixty days to ninety days that Judge Krueger will resign from the bench for personal reasons, and if he didn't a felony warrant would be issued against him."

When the discussion was about to end Haase asked Alan if a warrant would have to come through the District Attorney. Alan replied that it would, but that he wasn't ready yet, but maybe would be in thirty days. Haase then questioned whether the matter involved the

Judge's conduct of his court or his personal life. Alan indicated it was his personal life, and when asked again what it was replied that he could not tell yet and added, "But I have got him good. We have private detectives working on him".

Later that day Haase reported to Judge Krueger the substance of his conversation with Alan Eisenberg including the reference to the Judge's personal life. The Judge asked if Haase had any indication of what it might be that Alan had, and when Haase told him, no, the Judge said, he was worried, "that even an untrue vicious accusation could ruin him".

Haase's account is in a way somewhat supported by the testimony of witnesses, William Janz and Joseph Pecor, both also employed by the Milwaukee Sentinel. When Haase reported the substance of what he had learned from Alan and Judge Krueger to Janz and Pecor, they too were able to extract from Alan statements to the effect that Alan was considering obtaining a felony warrant for the Judge in an effort to remove him, and that the Judge's personal conduct was involved.

The defendants' evidence as to what was said in the press room on August 22, 1968, and thereafter presents a very different version. Alan Eisenberg in his testimony denied that he ever told Haase anything about the use of private detectives. Alan denies that he ever told Haase that he "had" anything on Judge Krueger. Alan denies that he ever told Haase the Judge would resign and he denies that he told Haase that if the Judge didn't resign, Alan would obtain a felony warrant.

Alan did say that he had a conversation with Haase in the press room, but the discussion was confined to the various ways of removing a judge in office. Impeachment, recall and removal as the result of a criminal prosecution were discussed, these being the three possible procedures that had been explained to Alan by Court Administrator Edwin Wilkie in a conference with Alan. Alan also said that he had told Haase that he didn't think Judge Krueger would finish his term, but this was during a conversation on Friday, later in the week, in Judge Seraphim's court when Alan had told Haase that Judge Krueger had behaved in a most unusual and peculiar manner in court that morning, and that he didn't believe Judge Krueger would last another two months. Apparently, this observation was not unique to Alan as witness Harry Meiroff also testified that there was general conversation to this effect going around the Safety Building.

The discussion between Haase and Alan in the press room was not a private conversation. Among those present were John Stallard, a reporter for the Milwaukee Journal, and George Petroff, a radio newsman. The State called Stallard. Petroff was not called. Stallard's testimony corroborated that of Alan Eisenberg in most of it's essential aspects. Stallard described the conversation between Haase and Alan as loud and heated so that he had no trouble hearing it. He remembered Alan discussing the three procedures for removing a judge, impeachment, recall and a criminal prosecution. His recollection was that the reference to a criminal prosecution meant that an investigation of Judge Krueger's conduct on the bench might reveal a basis for such action. Stallard could recall no mention of anything about possible indiscretions in Judge Krueger's personal life. Neither, could he say that Alan said he "had" something on the Judge or that Alan had private detectives following the Judge. Stallard was obviously hostile toward Alan Eisenberg and I believe that if he could have honestly implicated Alan in any wrongdoing, he would willingly have done so.

The defendant's brief also makes the point that the fact that the plaintiff did not call George Petroff may not be without significance. The significance is that if Petroff were present in the press room when Haase and Alan were talking, he would have remembered some of the conversation, and if his memory corroborated Haase's testimony, he would have been called.

In the brief which the defendants filed with me there are set forth on pp. 19 to 36 a number of other points which they contend cast considerable doubt on the accuracy of Haase's account of what Alan said to him. I have considered all of these points and I do not mean to be understood as dismissing them as insignificant or irrelevant. However, in view of the conclusion I have reached as to this facet of the case, I believe that all that is necessary here is to list them in summary form without further comment. They are:

(1) The loud, heated and complex nature of the discussion is likely to lead to misunderstanding and misreporting.

(2) Haase made no notes of his discussion with Alan on August 22, 1968, at the time.

(3) Haase typed notes made on August 26, 1968, at the request of his superiors, his testimony to Mr. Ettenheim of the Board of Bar Commissioners in September of 1968, and his testimony in this proceeding reveal several

variances, inconsistencies and contradictions. Some of these discrepancies can be dismissed as minor. Others cannot, especially Haase's failure to note Alan's reference to a felony warrant, which was later inserted in the notes by Janz in handwriting.

(4) Haase's bias colors what he thought he heard Alan say. He was looking for a story.

(5) Haase's motive in talking to Judge Krueger made for inaccuracy in reporting to him what Alan said. Haase wanted Judge Krueger's reaction and he was naturally inclined to report in a way that would obtain a reaction even if he omitted some of the facts.

(6) If Haase learned from a licensed attorney that private detectives had found evidence that a judge was guilty of criminal conduct, why didn't he report his finding to the District Attorney, or at least, to his superiors

(7) Haase's testimony is not corroborated by other witnesses to the conversation. Contrary to Haase's statement that he did not talk to Judge Krueger until after Alan referred to the felony warrant; Deputy Kuzmic, Judge Krueger's bailiff, said that Haase visited the Judge twice, once telling the Judge that Alan was saying he would resign in sixty to ninety days, and later reporting that Alan was telling everyone in the hall he was thinking of getting a felony warrant.

(8) Haase may have some guilt feelings of his own because it was his report to Judge Krueger that triggered the final tragedy.

(9) The successive approaches to Alan by Pecor and Haase using different "ploys and gambits" indicate more interest in obtaining a story than in ascertaining the truth.

(10) Haase was dishonest in some parts of his testimony.

(a) Haase first identified the hand written insertion on his August 26, 1968, notes as that of Janz. When he realized this was the only reference to the felony warrant, he said this was his writing. When pressed he said he was sure. When asked to write the same words they did not at all resemble his hand. Haase writes left handed. Janz writes right handed.

(b) Haase and Janz interviewed Alyce Neff at length after Judge Krueger's suicide. Haase did not disclose this during the bar investigation. When asked if others were present at the Neff interview, Haase referred to a deputy sheriff who stopped by. The fact was that the deputy was called to come during the interview and he was Deputy Kuzmic, Judge Krueger's bailiff, and Haase, who was almost daily in Krueger's court, must have known him.

(c) The day after Judge Krueger's suicide the Milwaukee Journal reported an interview with Attorney Edward Cameron reporting that Judge Krueger had attempted to jump from Cameron's car and had expressed great concern that the Eisenbergs were about to obtain a felony warrant. Haase, although he was so apparently upset by the Judge's death, denied knowing the facts reported in this story.

(d) After Judge Krueger's suicide, the Milwaukee Sentinel printed an editorial urging an investigation. Haase denied knowledge of this editorial.

(e) In addition to Haase, Janz, Pecor and other experienced skillful reporters were brought into play to try to obtain incriminating evidence against the Eisenbergs. The fact that so little resulted is itself an indictment of the accuracy of Haase's account.

I have indicated that my finding on this facet of the case did not require more than a summary of the defendant's challenge of the credibility of Ronald Haase. I again assume that the State must prove it's case by clear and satisfactory evidence to justify a finding in it's favor. I find that the State has failed to meet that burden as to this charge.

In the first place, there is no showing that Alan Eisenberg, a young attorney, recently admitted to the bar, knew or should have known that his statements to Haase would be repeated to Judge Krueger. He may have demonstrated that he was either naive or blinded by self-confidence, or both; but I cannot find that he intended, through Haase, to threaten the Judge.

In the second place, if I were to assume that Alan's statements were intended to intimidate the Judge, I do not believe that the State has clearly and satisfactorily proved that Alan said what the State charged he said.

2. Charge that statements that the Judge would resign within 60 to 90 days for personal reasons or a warrant would be issued and the mental suffering which such statements caused.

The section of the State's brief addressed to this charge first refers to the testimony of Mrs. Alice Boettcher and Mrs. Norman Sussman who were in a group present at the Belmont Hotel Coffee Shop late on the Sunday night preceding Judge Krueger's death. Both of these women said that they were present at a round table with others who more or less regularly assembled there late in the evening for coffee and talk. On this occasion Alan Eisenberg and his wife, who also patronized the coffee shop quite regularly, came in and Alan joined the group at the round table. Both Mrs. Boettcher and Mrs. Sussman testified that when Alan approached their table he had several copies of a press release in his hand; and in substance stated in a boastful manner that he had Judge Krueger where he wanted him, over a barrel, and that he would have him off the bench soon.

Alan's account of this incident is different. He first indicates that he believed that both Mrs. Boettcher and Mrs. Sussman were prejudiced against him, so that he did not talk to either of them. Alan says that he addressed his comments only to Senator Susman. He considered Senator Sussman a friend, despite their difference in age, because of previous discussions with the Senator over problems of mutual interest. Alan did not deny categorically the statements attributed to him by Mrs. Boettcher and Mrs. Sussman; perhaps because, as I have searched the record, he was never asked whether or not he made such statements. Alan did say that Mrs. Boettcher obtained a copy of the press release, but he denied addressing any statements to her or Mrs. Sussman. The general thrust of his testimony was that both of these women disliked him and were inclined to magnify out of all proportion anything that would tend to discredit him.

In regard to this incident even if I find, as I do find, that Alan made the statements that the two ladies said he made, I still do not see cause for serious concern. Such remarks were ill-considered, intemperate and displayed an unseemly brashness and arrogance. However, Alan is a young man, full of energy and enthusiasm. His outward appearance of supreme self-confidence and certainty may well be assumed, probably sub-consciously, to hide inner feelings of doubt and insecurity. In this instance, I am inclined to give him the benefit of the doubt and conclude that the impression he created in the minds of Mrs. Boettcher and Mrs. Sussman was the result of thoughtlessness and bad judgment, and not a deliberate attempt to convey the impression that he held the whip hand over Judge Krueger. Finally, I should add that there is no evidence that Alan's remarks at the Belmont Hotel were ever passed on to Judge Krueger.

The remainder of the State's brief in regard to this charge is devoted to a description of the extremely violent emotional reaction by Judge Krueger when he learned through reporters Haase and Janz that a criminal warrant might be sought. There can be little doubt on this record that the Judge's fears as to what might be revealed against him produced a severe feeling of despondency and despair. If there were any doubt, it is dispelled by his subsequent suicide. However, whether Judge Krueger's emotional state can be fairly attributed to anything which either or both of the Eisenbergs said or did is quite another matter. I will discuss this point further when I reached the charge regarding the Alyce Neff affair.

3. The third section of the State's brief is directed to the publication of ads in the Milwaukee Journal requesting that anyone with a complaint against Judge Krueger should report it to Mr. Maxaculi, a friend of the Eisenbergs. The ad ran from the Spring of 1968 until August of that year when the Judge committed suicide. Apparently, Alan worded the ad and placed it initially. There is no evidence that Sydney was involved other than in signing the firm or business checks for payment for the ads. When the ads were first published, Alan and others were interested in attempting to recall Judge Krueger. A petition seeking his recall had been printed. There is no evidence that these ads caused any serious mental or emotional disturbance to Judge Krueger. On the contrary, the testimony was that he was not concerned about complaints as to the conduct of his court, no matter how many, and he would welcome any fight on that issue.

There remains the possibility of whether the mere placing of the ads was unprofessional conduct. If the evidence showed that these ads were published in bad faith and without foundation, for no purpose other than to embarrass and discredit a sitting judge, I would find that such action warranted censure and discipline. But, there is no such evidence. On the contrary, there is substantial evidence that Judge Krueger's conduct on the bench was such as to cause legitimate concern as to his fitness and competence for the office on the part of those practicing before him or even merely present in this court. There was also uncontroverted evidence that Alan had expressed his concern over Judge Krueger's conduct to appropriate officials on more than one occasion and had been advised that a recall procedure was one way of attempting the removal of a judge. Obviously, if a petition for recall based on legitimate complaints was intended to be circulated, potential signers would need to be solicited. Accordingly, I find that causing the publication of the ads was not in itself meretricious or unprofessional conduct

In reaching this finding, I am not unmindful of the fact that the ads did not mention either Eisenberg, although prepared and paid for by them. I can understand why a lawyer practicing before a judge might consider it foolhardy to openly associate himself with ads soliciting complaints against that judge. Moreover, I have not forgotten that in addition to the ads Alan asked a one-time client, Miss Shilltis, to distribute flyers, similar in content to the ad, in front of the Safety Building. In this regard, I do not see that the means of publication, whether in the newspapers or by hand-outs, should determine whether or not the statements were or were not non-professional activity.

The final paragraph of the third section of the State's brief, while not exactly dismissing the ads as insignificant, does drop the matter by stating that "use of responses to these ads became wholly unnecessary when the Eisenbergs came into possession of the much more powerful weapon that the Judge was wide open for intimidation by reason of incidents in his personal life involving a crime of moral turpitude." This statement, of course, contains the assumption that the Eisenbergs did come into possession of a "much more powerful weapon". This can only mean knowledge by the Eisenbergs of Judge Krueger's belief, whether fact or fantasy, that he had had sexual relations with Alyce Neff. I believe it sensible to defer further analysis of this aspect of the case until we come to the charge which refers more directly to the Alyce Neff affair.

4. Charge relating to threats by the defendants to the effect:

> (1) "We have so much on the Judge that we are really going to chop him up."
>
> (2) "He's going to have to agree to what Alan and I decide."
>
> (3) That the Judge would have to read in open court the press release authored by Sydney Eisenberg.

To enable the court to understand my analysis of this charge, I think it will be necessary for me to narrate as briefly as I can some background testimony. On Thursday, August 22, 1968, after Judge Krueger had learned from reporter, Haase, that the Eisenbergs might be seeking a criminal warrant; the Judge called a friend, Attorney Edward Cameron, and asked him to come to the Judge's chambers. The Judge then informed Cameron that he thought the Eisenbergs were out to ruin him, might seek a criminal warrant against him and also made vague allusions to women. Cameron said the Judge was somewhat upset at this time. The next day, August 23, 1968, at about 11:00 A. M., Cameron again received a call from a very agitated Judge Krueger asking Cameron to come to see him on a personal matter. Cameron suggested that they meet for lunch and that he would pick up the Judge. When Judge Krueger got in the car he started to sob and stated that the Eisenbergs were going to ruin him. He said, "Ed, I had sexual relations with Alyce Neff and the Eisenbergs know it". The Judge continued to sob and cry on the way to the luncheon place and stated that he was an adulterer; and that even if no warrant was issued, the publicity would ruin him and he would lose his wife and children. The

Judge had two martinis before lunch, although apparently he did not usually drink at noon, and seemed to somewhat regain his composure until the lunch was about over when he again started to break down, so Cameron led him out of the restaurant and the Judge suggested a ride. On the way to lunch, Judge Krueger had indicated that the solution for him was suicide. After lunch, as they were driving on the expressway at 45 to 50 miles per hour, the Judge tried to open the door and jump or fall out of the car. Cameron restrained him and at least partially reassured him by saying that he would get in touch with Sydney Eisenberg, get to the bottom of it and settle it one way or another.

Cameron could not reach Sydney until about 7:30 P. M. in the evening of that day because Sydney and his wife had been in Elkhorn trying a case. Cameron went to Sydney's home and was admitted by the maid. When Sydney and his wife, Miriam, arrived, Cameron explained that Judge Krueger seemed so concerned about his relationship to the Eisenbergs that he had attempted to commit suicide. Cameron's testimony as to Sydney's statements in the course of this conversation is the basis for the State's fourth charge. Mr. Cameron testified that shortly after he suggested that the matter was serious and that something should be resolved, Sydney in an excited manner said, "Ed, the man is a bigot. He is against Jewish people. Why did he make the remark and it was in the paper, too, 'Are you still working for that Jew on 11th Street?' He is a bigot, and I am not going to be led to the ghetto like the people in Europe. . . . I spent a lot of money getting information on this man. We could chop him up, Ed; and we are going to do it."

Cameron also testified that Sydney made similar statements in a telephone conversation to the effect that they had had so much information on the Judge that they could "chop him up", and ruin him. The record is not clear, but presumably, this telephone conversation occurred after Cameron had returned Judge Krueger to the Safety Building on Friday afternoon, August 23, 1968, while Sydney was still in Elkhorn.

The State's second charge under what, for want of a better term, I will call count four, refers to Sydney's alleged insistence that Judge Krueger was "going to have to agree to what Alan and I decide". Again, the State relies solely on the testimony of witness, Cameron. This statement by Sydney is said to have been made on the Friday evening during the discussion at Sydney's home.

The third subdivision of what I have called count four of the State's brief charges that Judge Krueger would have to read in open court the press release authored by Sydney Eisenberg. The first draft of the Monday, August 26, press release that Judge Krueger issued appointing Sydney and Alan Eisenberg and Cameron to an advisory committee for the Judge's court, was prepared in Sydney's office on the Saturday afternoon preceding the Judge's death. When Cameron left Sydney's home on Friday evening, he went to the home of the widow of his late partner, Matt Shimitzz and called Judge Krueger. Cameron told the Judge in effect that everything was all right and that the "Packer tickets were in" which, he explained was a code to indicate that the Eisenbergs apparently knew nothing about any affair with Alyce Neff. It had been arranged that the Judge and Cameron would meet at Cameron's office the next morning, Saturday, to discuss further action. It was after this conference that Cameron went to Sydney's office on Saturday afternoon. There is a dispute as to whether Sydney or Cameron played the major role in dictating the first draft of the press release; but, in any event, Cameron's testimony was in substance that Sydney told him that the price of peace would be that the Judge issue the press release.

Again, the evidence produced by the defense presents a quite different version of the background events preceding the press release. Sydney's account is that when Cameron came to his office on Saturday, Sydney suggested that, perhaps, an Ombudsman to whom citizens could present complaints might be helpful. However, Cameron rejected that idea and, presumably speaking for Judge Krueger, with whom he had just conferred, proposed an advisory traffic court committee to be announced in a release to the press. When Sydney did not dissent, Cameron, with some participation by Sydney, dictated most of the press release.

There is conflict as to Alan's involvement in the Saturday afternoon draft. Cameron said that Alan was present throughout, but Sydney dictated the release from beginning to end. Sydney, Alan and June Fell, the stenographer present, all said that Alan came in after the release had been typed. Alan made three suggestions for a change in Judge Krueger's practices: staying sentence to permit payment of fines; use of a reporter in contested cases; and opportunity to explain failure to appear in bond forefeitures. Cameron thought they were all good, but none of them appeared in the final version of the release issued by Judge Krueger.

The defense's version of the Saturday afternoon incident is corroborated both directly and indirectly. Positive and persuasive corroboration comes from June Fell, the stenographer who took the dictation. Sometime after Judge Krueger's death, June Fell left the Eisenberg firm "to get away from the horrible hate phone calls" and was working in Arizona at the time of the hearing. When June Fell took the dictation on Saturday afternoon she noted who was speaking. She came back to Milwaukee to testify. Her testimony corroborates Sydney's, not only to the effect that Cameron wanted the release to show to Judge Krueger, but also to the effect that Cameron did most of the dictating.

There are a large number of portions of the brief which defendants presented to the referee, which present analysis of evidence which inferentially support the defense's contention that the Monday press release by Judge Krueger was generated by the Judge and Mr. Cameron, and expressed for the most part their ideas, rather than being the result of intimidation or coercion exercised by the Eisenbergs. In view of the conclusion I have reached on this aspect of the case and in the interest of brevity, I do not believe that it is necessary to attempt to summarize all of this circumstantial corroboration. I will no refer to some of the points which I believe to be most significant and will discuss some others in dealing with the State's first charge regarding the Judge's fear of being exposed by the defendants for his possibly adulterous conduct with Alyce Neff.

After Cameron and Sydney had worked out a draft of a press release on Saturday afternoon, Cameron, Judge Krueger and the Judge's bailiff, Steve Kuzmic, met to discuss it and agreed that several changes should be made. I believe this was in the morning of the following Sunday. Later on Sunday, the Judge and Cameron called on Sydney at his home. Alan was there when they arrived. Much of the visit was merely social, the Judge expressing interest in Sydney's house and it's furnishings. Just before the Judge left, all sat at a table and Judge Krueger read to them the changes and additions he had made in the draft of the press release. There is no evidence that any of the Eisenbergs, Miriam, Sydney or Alan, disputed any of the Judge's changes or even commented on them.

The changes which were made in the draft of the release which Judge Krueger presented on Sunday, when compared to the Saturday draft were not inconsequential. The Saturday draft contained a statement that the Judge would not seek reelection. This was deleted from the Sunday draft. The Saturday draft named Miriam Eisenberg to the traffic court advisory committee. The Sunday draft omitted Miriam and substituted Cameron. The reference in the Saturday draft to the "nationally and internationally known" Eisenberg firm was deleted in the Sunday draft. Finally, the statement regarding eliminating bigotry in the court in the Saturday draft was substantially softened in the Sunday version, and even the Sunday version was again softened further in the release ultimately issued by the Judge when he called Cameron to tell him what Cameron's secretary should type as the final draft. Neither Eisenberg was advised in advance of this final change. They learned of it only after the release had been given.

The defendant's point, of course, is that neither the Judge's affable conduct at Sydney's home, nor his subsequent unilateral changes in the press release, either made without protest from the Eisenbergs, when they knew of the changes, or made without consultation with them, is consistent with the theory that the Judge felt that he was under great pressure, if not practically compelled, to issue a press release which said what the Eisenbergs wanted him to say, "or else". The defense's arguments are sufficiently persuasive to prompt me to find that the State has not proved by clear and satisfactory evidence that the Monday press release issued by Judge Krueger was the result of pressure, threats, open or veiled, or any other form of intimidation exerted by the Eisenbergs, designed to force such a statement from the Judge.

5. The State's fifth charge is summarized in the fifth heading of the plaintiff's brief: The testimony establishes that the acceptance and reading of the press release by the Judge arose out of his fears of being exposed by the defendants of committing adultery, which fear they exploited in a way to humiliate him and to aggrandize themselves by demonstrating that they had successfully subjugated him.

The evidence leaves no doubt that Judge Krueger believed that he had committed adultery with Alyce Neff. Whether his belief was founded in fact, or was a self-induced fantasy, we will never know. However, there is ample evidence that the Judge was convinced in his own mind that he had had an illicit affair with Alyce Neff. Cameron, Milwaukee Sentinel Editor Schwander, and Deputy Kuzmic all say the Judge told them he had had such an affair. Moreover, it seems reasonable to conclude that the Judge's belief, whether based on fact or fantasy, was at least a contributing factor to his periods of anxiety and despondency and, perhaps, his ultimate suicide. I say only that it is reasonable to reach this conclusion because I believe that any human personality is so complex as to make it impossible to state with certainty that any one factor is the sole and immediate cause of self-destruction.

In any event, even if Judge Krueger believed he had committed adultery and was afraid of being exposed; it would be necessary in order to fasten any responsibility upon either or both of the Eisenbergs to show that one or both of them knew that the Judge had this belief and exploited it, or attempted to exploit it, in an improper manner. The State's chief contention is that the Eisenbergs did just that, and whether it has been satisfactorily established that they did is the heart of this case.

The State again relies heavily on the testimony of Cameron. He said that after the press release had been prepared on Saturday afternoon he asked Sydney what would be done with the evidence that had been obtained against Judge Krueger. Cameron said Sydney's reply was, "Well, Ed, I'm not going to destroy the evidence that I have gathered against Judge Krueger because he could declare war again two weeks after he read it. You have nothing to worry about, as long as he gives this press release, then the Eisenbergs will be his friends, and we will come into his camp, as long as he gives this release. The only thing you got to worry about is to get to the broad and tell her to keep her mouth shut, and everything will be alright". Cameron's reply was to the effect that he thought so, too. The State's brief also points out that Cameron in substance gave the same account when interviewed by Milwaukee Journal reporter Alex Dobish. Cameron said to Dobish that he asked Sydney, "What will you do about your evidence?"; and Sydney replied, "Can the broad keep her mouth shut?". Cameron said, "I think so." Assuming that the reference to "the broad" in Cameron's report as to Sydney's statement can only refer to Alyce Neff, this is the only direct evidence that I can find which indicates the Eisenbergs had any knowledge of the Judge's indiscretion, if there was an indiscretion.

The State produced testimony as to two other incidents which the State argues support Cameron's statements. The first is what the State calls a mental slip on the part of Mrs. Neff when she was questioned by reporters, Janz and Haase, for over three hours in her office. In this session, Mrs. Neff repeatedly and constantly denied that she had had sexual relations with Judge Krueger. However, at one point, according to Janz, in response to questions designed to ascertain how the Eisenbergs learned about the alleged affair, Mrs. Neff said, "the Eisenbergs couldn't have found out unless they bugged the place". And she said, "even then they wouldn't know anything". Later in his cross-examination after again saying that Mrs. Neff repeatedly denied having sexual relations with Judge Krueger; Janz testified, "She made some statements that they couldn't know anything even if they had bugged the place".

Assuming that Mrs. Neff made the statements attributed to her by Janz, I do not regard them as either a slip of the mind or the tongue. In my mind these statements are at least as consistent, if not more consistent, with Mrs. Neff's assertion that no illegal sexual intercourse had occurred, than they are inconsistent with her assertion. I would interpret these statements as expressions of conviction that no matter what means of observation or detection were used, nothing damaging could have been learned because nothing damaging took place.

The other incident produced in the State's testimony, although not argued in the State's brief, which might be possibly considered as supporting Cameron, is that of newsman, Joseph Pecor, who was present at a gathering late Monday night, August 26, 1968, at a pizza place with Sydney, Alan and Neil Eisenberg and Michael Maxaculi. Pecor said that he overheard Alan saying that "he is 21 and can go to Illinois if he wants to". Pecor recorded this in his notes because he had been told to report to his employers any discussions with Sydney or Alan. However, Pecor admitted that he didn't know in what context Alan's statement was made; and Sydney, Alan, and Neil Eisenberg and Michael Maxaculi all testified that this remark had nothing to do with Judge Krueger, but referred to a meeting which had been held earlier that evening in which a dentist who had been president of a business corporation, in which the Eisenbergs and Maxaculi were interested, had resigned to go back to practice dentistry in Illinois.

The defense marshalled a great deal of evidence, both direct and circumstantial, in opposition to the State's charge. Both of the Eisenbergs denied having any knowledge of any illicit affair between Judge Krueger and Mrs. Neff and Mrs. Neff denied that there was such an affair.

The defense also cast some doubts as to whether there was in fact an affair between the Judge and Alyce Neff by the testimony of Dr. Leigh Roberts, a psychiatrist who had studied the Judge's behavior. He said the Judge was suffering from what he termed involutional melancholia, an illness brought on by the decline of life functions, including sexual ability. Dr. Roberts could not state that the Judge's statements about adulterous intercourse with Alyce Neff were the result of delusion, but he did state that this was the type of delusion that a man in the Judge's condition might have. Dr. Roberts also stated that he was convinced that some of the Judge's beliefs about the affair were delusional, i.e., the Judge's belief that the Eisenbergs knew of it. This testimony of Dr. Leigh Roberts, along with other known facts about Judge Krueger's conduct, such as firing a pistol in his court and riding a bicycle in the corridors of the Safety Building, raises doubts in my mind as to his mental stability during the days immediately preceding his suicide.

The defense presents another salient point when it questions why, if the Eisenbergs knew of any illicit activity by the Judge with Alyce Neff, did they wait so long to put pressure on him. The date of the alleged affair was never definitely established, but the evidence places it between March and June of 1968. The press release was on August 26, 1968. In this regard, the defendant's brief for the referee puts some pertinent and unanswered questions: "If the Eisenbergs were following Judge Krueger as he said to Schwander, what were they doing with the information in the intervening time? Why didn't they approach Judge Krueger? Why did he have to approach them? Why did they have to run an ad as the State claims? If Haase is to be believed, why would Alan need another 30 days? All these questions arise from proof offered by the State. The State has not attempted to answer one."

When the matter of detectives was first mentioned at the hearing, I had some questions of my own which I did not ask, thinking that further proof offered by the State would clarify the matter. Clarification was not made, but, as we progressed to other facets of the case, I forgot to pursue the matter. My thoughts were: if detectives had been used, could the State not find out who they were? The police must know of all the private detectives working in the Milwaukee area. If detectives were used, they could be asked what they discovered, or did not discover. I know of no detective client privilege.

The defense's brief also advances many other arguments in support of it's position. I will try to summarize the most significant.

I am impressed with the defense's point that if Cameron asked Sydney on Saturday afternoon what Sydney was going to do with the evidence; and Sydney replied, "Can the broad keep her mouth shut", to which Cameron responded, "I think so", this leaves Cameron appearing a good less than diligent in his effort to befriend Judge Krueger. If, as the defense points out, the "guts" of the matter was whether the Eisenbergs knew or did not know of the Judge's belief that he had an illicit relationship with Alyce Neff, it would seem that Cameron would not leave the matter in such an inconclusive state.

Next, the defense points out that Cameron's question to Sydney on Saturday is inconsistent with what he said was his conviction on Friday night. Cameron said that on Friday he did not believe the Eisenbergs had any knowledge of any affair between the Judge and Alyce Neff, and such was the thrust of his partly coded message later Friday night to Judge Krueger. The defense's point is, why, then, would he question Sydney as to what would be done with the evidence when the Judge had only expressed concern over his involvement with Mrs. Neff and had not shown any worry over anything the Eisenbergs might have obtained as the result of the ads? Finally, the defense also notes that Cameron told reporter, Alex Dobish, that these questions and answers took place at Sydney's home on Sunday, and not on Saturday, as Cameron testified at the hearing.

The defendant's brief makes other points which circumstantially make the plausibility of Cameron's testimony questionable, which I have not ignored; but do not believe need analysis.

The defense also produced evidence which went directly to Cameron's bias and credibility. Again, I attempt to summarize the evidence which I believe most significant.

The defense's first point is that the newspaper stories reporting Judge Krueger's second press release on Tuesday, August 27, 1968, in which he stated that the Eisenbergs had harassed and pressured him into giving the press release which he made the day before, and the newspaper stories following the Judge's death which went well beyond intimating that the Judge had committed a serious indiscretion in his personal life, and that the Eisenbergs knew of it and exploited it, created a climate which made it practically impossible for Cameron to say anything in defense of the Eisenbergs.

The defense's brief also points out that Cameron had been, at the least, quite successful in defending his clients in Judge Krueger's court and that Judge Krueger had talked to Cameron about making him a Court Commissioner, so that Cameron had an interest in Judge Krueger's staying in office.

The defense also attacks Cameron's credibility, by evidence, that he himself was involved in criminal activity, if not at the center, at least at the periphery. He patronized the "Ski Hut", which testimony indicated was a gathering place for assorted thieves, burglars, robbers, shoplifters and ex-convicts. Whether he did so frequently or only occasionally is disputed. There was testimony that Cameron had invited one of the witnesses to set fire to a tavern he owned, presumably to collect fire insurance, and that Cameron had suggested robbing a former law associate who was known by Cameron to carry large amounts of cash on his person in a certain pocket.

The testimony during this portion of the hearing, filled, at least in part, what had been a void in the education of the referee. Brother testified against brother. The unmarried mother of children by both brothers testified in support of the brother who had implicated Cameron. Attorney Zelonky, Cameron's former law associate, corroborated the testimony of convict, Clarence Harris, who was brought down from Waupun to testify.

I do not think it is necessary for the purposes of this report to discuss in further detail the evidence on this aspect of the case. I believe it is sufficient to say that, while I am not prepared to suggest that either the Board of Bar Commissioners or the Milwaukee County District Attorney prepare charges against Attorney Cameron, the defense has produced enough evidence of his possible involvment in criminal activities to raise serious doubts in my mind that he told the truth, the whole truth and nothing but the truth.

The defense's brief analyzes several other items of evidence presented by the record, all of which tend in some degree to cast doubt on the validity of the State's contention that the Eisenbergs forced Judge Krueger to issue the Monday press release and used it to aggrandize themselves and demonstrate that they had subjugated the Judge. Much of this evidence, such as the calm and confident demeanor of Judge Krueger at Sydney's home on Sunday afternoon and his similar behavior at dinner that night at Cameron's home is not only inconsistent with the State's contention, but also supports the defense. For example, if Judge Krueger's Monday press release was the result of fear of exposure by the Eisenbergs, why would he suddenly lose that fear on Tuesday and issue another release charging that he was pressured and also refuse to see either Eisenberg?

I do not feel that it is essential that I discuss all of these bits of evidence presented by the defense. What I have written so far indicates that I am not persuaded that the State has proved it's charge by clear and satisfactory evidence.

Again, even if it is assumed that Judge Krueger believed that the Eisenbergs knew of an illicit affair and were in a position to expose him to achieve some improper objectives of their own; the Eisenbergs cannot be held accountable unless it is also shown that they knew this brief (whether it was founded in fact or fantasy would make no difference) and somehow directly or indirectly communicated their knowledge to Judge Krueger with a purpose of compelling him to conduct himself as they commanded him, i.e. blackmail with conduct, not money, being the price of silence.

My conclusion, after studying the long record and after considerable thought, is that almost the entire case is the result of a most unusual and unlikely combination of coincidences. Alan Eisenberg, young, energetic, perhaps overly self-confident, eager to gain recognition, recently graduated from law school and not yet knowledgable of the sometime imperfection in the machinery for dispensing justice, including the men who dispense it, becomes increasingly disenchanted with the judicial practices of Judge Krueger to the point where Alan is seeking ways to remove Judge Krueger and to that end causes ads to be published requesting that people with complaints against the Judge report them. Alan's activities have tacit, if not active, support of his father, Sydney. Judge Krueger is aware of Alan's activities, but indicated no concern over any attack based on his performance on the bench. Judge Krueger, however, does feel that he is very vulnerable to an attack on a completely different front, his adulterous relations with Alyce Neff, whether a fact or fantasy, is immaterial. Initially, Judge Krueger is not concerned because he has no reason to think that the Eisenbergs knew or even suspected him of any improper relationships with Mrs. Neff. Then Alan in a conversation with Sentinel reporter, Haase, refers to the possibility that Judge Krueger could be removed through the use of a warrant charging him with a felony, which, if proved, would result in the Judge's removal. Haase passes information about a felony warrant on to Judge Krueger, and the Judge in turn speculated about the possible basis for such a warrant and the

Alyce Neff affair comes to his mind. The Judge concludes that the Neff affair is the basis for Alan's statements and is reinforced in this conclusion when reporter, Janz, again reminds him of talk about a felony.

I believe that in reaching this conclusion, the Judge added 2 and 2 and reached a total of 10. My belief is fortified by the evidence of Judge Krueger's conduct and the testimony of Dr. Leigh Roberts, both of which indicate that at this time Judge Krueger was at times not a completely rational man. The physical facts also support this conclusion. The Judge thought that he had been seen having sexual relations with Mrs. Neff through glass partitions in her office. The evidence is undisputed that the glass panels were completely opaque.

In sum, I am persuaded that Judge Krueger was convinced that the Eisenbergs were in a position to in effect blackmail him when, in fact, they were not because they did not know of the "Achilles's heel", the affair with Alyce Neff, and therefore, could not use any information which they did not have. I do not wish to appear repetitious; but since this is the "guts" of the State's case, I again emphasize that I can find no evidence in the record that either of the Eisenbergs had any knowledge, or even intimation, of the Judge's sex relations with Mrs. Neff, whether real or imaginatory, except Cameron's testimony that Sydney asked him if, "the broad could keep her mouth shut". I have stated the reasons for being unable to make a finding for the State based solely on this evidence. Accordingly, I find that the State has failed to prove by satisfactory and clear evidence the charge set forth in the fifth heading of the State's brief.

6. The sixth section of the State's brief states: The harassment of a Judge by a pattern of conduct designed to enable certain attorneys to so subjugate such Judge and to demonstrate to the public their domination over the Judge and the operation of his Court is such an attempt to subvert the administration of Justice and hold it up to disrepute as to warrant disciplinary action.

After summarizing some of the evidence, I have discussed above, the sixth section of the State's brief is devoted to extracts from other cases showing that, if the Eisenbergs were found to have conducted themselves as the State claims they did, this would be ample ground for severe discipline. I have no quarrel with this; but, as I have stated, the State must first prove that alleged unprofessional conduct occurred.

The sixth section of the State's brief does make one point that has troubled me. That is, the composition of the Monday release, the words used and the matters emphasized do not seem to me to be completely consistent with the defense's theory that the release was primarily a product of the work of Cameron and Judge Krueger. However, I do not think that this feeling of uncertainty is sufficient to warrant making a finding that the State has sustained it's burden. After all, the evidence showed that several hands had participated in the drafting so that it probably should not be surprising that the final draft did not appear to bear the imprint of any one personality.

I believe that I have said all that I need to say in analysis of the charges set forth in the State's brief. There remain two loose ends that I think I should write to in the hope of trying to present the whole picture.

I first take up the testimony of Orville Pitts. He said that Alan saw him on Monday and told him to come to Judge Krueger's court and "watch Alan make an ass of Judge Krueger", or "watch Judge Krueger make an ass of himself". Pitts was not sure which. After the Judge's death, Pitts reported Alan's remark to a group in the court house corridor which was discussing the Judge's suicide. Pitts' statement as to Alan's remark was either overheard by Milwaukee Journal reporter, William Hale, as Pitts claimed, or was made directly to Hale, as Hale claimed. In any event, Alan's remark to Pitts was printed. When Alan saw the newspaper, he said he called Pitts denying that he made such a remark and asked Pitts why he would make such a statement. Pitts, by his own admission told Alan that he had not said it and also said he would call Hale, but he never did. Alan also called Hale denying the statement.

If any one attorney said to another in the presence of several lay people, i.e. publicly, that he was going to make an ass out of a Judge or to watch a Judge make an ass of himself; I would regard such statements as lacking proper professional decorum calling for some rebuke; but I would not consider them the equivalent of high treason. If such statements were made in private from one attorney to another, I would regard it as merely earthy shop talk—the type of conversation indulged in by many lawyers.

In any event, on this cloudy record I am not prepared to find Alan Eisenberg guilty of unprofessional conduct on the basis of what he may, or may not, have said to Orville Pitts.

The other loose end which I feel I should discuss is the reference in the State's brief to over-sensitivity by the Eisenbergs, allegedly almost a persecution complex in Sydney, to anything that might be interpreted as anti-Semitic. The obvious purpose is to show extreme animosity in Sydney toward Judge Krueger as a motive for injuring him.

It is undisputed that Judge Krueger, when a young associate of the Eisenberg firm appeared before him, asked, "Are you still working for that Jew (or Zoo) on 11th Street?" Whether he used the word "Jew" or "Zoo" is uncertain. In any event, the Judge's remark was printed in the Milwaukee papers.

Howard Mieritz, a reporter for Judge Krueger, testified that after Judge Krueger's remark, he was subpoenaed by Sydney to testify in another matter involving a workman's compensation claim and that Sydney told him then, "I am going to get him for that remark". Sydney denies that he made such a remark and a witness present denied hearing any such remark made. Mieritz did not report the remark to Judge Krueger or to anyone else until after the Judge's death when the newspaper stories implicated the Eisenbergs as perhaps culpable parties. It appears also that Mieritz was probably irritated with Sydney because he had been subpoenaed with his notes and not asked to prepare a transcript which would have meant a larger fee.

The State also refers to Cameron's testimony that Sydney told him that Krueger was a bigot and against Jewish people, referring again to the "Jew—Zoo" remark. If I assumed, which would be difficult, that Sydney made the statements attributed to him; I still could not find that this demonstrated such a dedicated enmity toward Judge Krueger that Sydney was determined to discredit or destroy the Judge by any means, fair or foul. The "Jew—Zoo" statement was made. Sydney's reaction was at least understandable. The remark was insulting whether the Judge said "Jew" or "Zoo". However, Sydney's reaction while he was still smouldering as the result of the Judge's comment is not sufficient, in my judgment, to support the conclusion that he was thereafter devoted to a campaign to ruin Judge Krueger.

II.

ANALYSIS OF THE EVIDENCE CONSIDERED IN ITS ENTIRETY.

I have, I hope, adequately explained the reasons for my conclusions as to each of the specific charges made against the defendants in the State's brief. In regard to each, I have found that the State did not meet it's burden of establishing the charge by clear and satisfactory evidence. There remains in my mind, however, the question of whether or not the conduct of both or either of the defendants, when considered in it's entirety, deserves condemnation and, perhaps, discipline.

In regard to Sydney Eisenberg, whether his words and conduct be appraised in relation to each charge or as a whole, I feel compelled to recommend that the complaint be dismissed. I do not know whether or not Sydney Eisenberg engaged in practices in the past which may have made him suspect to the eyes of the Milwaukee newspapers and, perhaps, to the eyes of some of his bretheren in the Milwaukee bar. If I did have any such knowledge, I would disregard it as irrelevant. My assignment, as I understand it, is to make findings as to certain specific charges of misconduct, and no more.

In regard to Alan Eisenberg, I have some reservations. This young man's conduct, both as evidence by the testimony and as I observed him at the hearing, disturbs me. I have in mind, for example, the reaction which Alan produced in Mrs. Boettcher and Mrs. Sussman on Sunday night when he was exhibiting the press release to be issued by Judge Krueger the following morning. I did not find this incident amounted to unprofessional conduct, but I do not believe that it is the sort of behavior that should be encouraged or applauded. I have also in mind the evidence that Alan was overly loquacious in announcing in the office of the Court Clerk that he was running the ad soliciting complaints against Judge Krueger every day; and also his alleged statement to Assistant District Attorney, Jennero, when Judge Krueger was reading his Monday press release, "Listen to this, I have got him".

I further have in mind that Alan Eisenberg in the course of the hearing often voiced objections and interposed arguments that I deemed frivilous and sometimes insulting to my intelligence and competence as a referee. (Sydney also objected often and also often engaged in what can only be described as oratory, but most of his objections were based on his notion that everything said out of his presence was automatically hearsay, and his oratory stemmed from his feeling of being unjustly prosecuted, if not persecuted.)

My net reaction to Alan's conduct, as described in the testimony and as I observed it, is ambivalent. On the one hand it is consistent with the characterization that he is a young, energetic and bold crusader for causes that he believes to be right. On the other hand, I think his behavior is also consistent with a character excessively ambitious to make a name for himself, overly self-confident, self-centered, arrogant and brash, to a degree that would make him disregard his professional obligations to gain his own ends. I report these thought because I think it is my duty to convey to the court all of the imprints that have been made on my mind in this proceeding.

As to Alan Eisenberg, I am inclined to, for the most part, give him the benefit of my doubts. I am not prepared to find that Alan engaged in any conduct which would warrant suspension or disbarment; but I do believe that Alan's behavior, when considered as a whole, falls short of the standard which the bar should insist be met by even a recent law graduate and deserves some reprimand and admonishment. Accordingly, I recommend that the complaint against Alan Eisenberg be dismissed, but he should also be reprimanded by the court and admonished, from now on, to conduct himself in a professional fashion. I might have recommended more severe discipline of Alan, if I did not believe that this proceeding and it's attendant publicity has caused him to engage in some serious thinking about the standards to which he should adhere in what he says and what he does as a lawyer. If Alan is wise, and I hope he is, a word to the wise should be sufficient.

I deliver to the Clerk of the Court with this report:

The pleadings submitted to me as Referee.

The transcript of the testimony at the hearing.

The exhibits as sent to me by the Richard Peppey Reporting Company.

Respectfully submitted,

/s/ George H. Young
George H. Young, Referee

March 12, 1970

* * *

MOTION [—formal parts omitted.]

NOW COMES the defendants, Sidney M. Eisenberg and Alan D. Eisenberg, by their attorneys Lawton & Cates, by Richard L. Cates and John H. Bowers, attorneys, and on all of the records, files and proceedings herein:

MOVES THE COURT

For Judgment dismissing the complaints in the above entitled matter.

Dated this 17th day of March, 1970.

Respectfully submitted,

LAWTON & CATES

By: /s/ Richard L. Cates
Richard L. Cates

By: /s/ John H. Bowers
John H. Bowers

Attorneys for the Defendants

* * *

MOTION [—formal parts omitted.]

NOW COMES the plaintiff, State of Wisconsin, by Rudolph P. Regez, its attorney, and Warren H. Resh, Of Counsel, and on all of the records, files and proceedings herein and upon the direction and approval of the Board of State Bar Commissioners:

MOVES THE COURT FOR JUDGMENT

1. That the charges in the complaint herein are proven and true.

2. That the defendants are guilty of unprofessional conduct tending to bring the courts into disrepute and contempt and which conduct is contrary to the duties of the defendants as licensed attorneys and in violation of their oaths as attorneys taken pursuant to Sec. 256.29, Wis. Stats.

3. That there be imposed upon each of the defendants such discipline as the court determines appropriate.

4. That the defendants be required to pay the costs and expenses of this proceeding.

Dated March 30th, 1970.

Respectfully submitted,

/s/ RUDOLPH P. REGEZ
Rudolph P. Regez

/s/ WARREN H. RESH
Warren H. Resh

Attorneys for the Plaintiff

* * *

MOTION TO DISMISS COMPLAINT AND FOR ORAL ARGUMENT [—formal parts omitted.]

Now come Alan David Eisenberg and Sydney M. Eisenberg, by their Attorneys, Lawton & Cates, and Richard L. Cates and John H. Bowers, and upon all of the records, pleadings, and files herein, and upon the Referee's findings of fact, report and recommendation on file herein, move the Court for its judgment dismissing the complaints against the above named defendants upon the grounds that:

1. The relief sought by the Plaintiff State of Wisconsin in this Court for judgment that ". . . the charges in the complaint are proven and true" is not constitutionally permissible;

2. The Plaintiff State of Wisconsin has asked for no relief which the law allows;

3. The Referee has found that the defendants did not engage in the conduct nor commit the acts charged against them by the Plaintiff State of Wisconsin.

And the defendants by their counsel move the court for oral argument.

WHEREFORE, Defendants move the Court for its judgment and decree dismissing the complaints against them.

Dated this 6th day of April, 1970.

Respectfully submitted,

LAWTON & CATES

/s/ Richard L. Cates
Richard L. Cates

/s/ John H. Bowers
John H. Bowers

Attorneys for Defendants,
Alan David Eisenberg and
Sydney M. Eisenberg

AFFIDAVIT [—formal parts omitted.]

RICHARD L. CATES, being first duly sworn, on oath, deposes and says:

1. That he is one of the attorneys representing the defendants in the above captioned matter.

2. That he was responsible for conducting the defense of these defendants during the course of the trial which was held before the Honorable George H. Young, Referee.

3. That the trial held before the Honorable George H. Young, Referee, began on May 26, 1969, in the City of Milwaukee, Wisconsin. The taking of testimony was finally concluded at approximately 11:00 p. m. on the night of August 20, 1969. That although this trial was not concluded during this entire period, it did consume 31 actual days of hearing. The written transcript made during this hearing totaled in excess of 4,000 pages.

4. In this proceedings the State was represented by counsel and the defense was represented by counsel at

all times. All witnesses who appeared gave their testimony under oath and were subject to both direct and cross examination. The proceedings in this hearing in terms of the presentation of proof were substantially the same in all respects to a criminal proceeding.

5. The trial was conducted in an adversary way and was in fact from the issuance of the complaint a wholly adversary proceeding. Not only did the parties to the action litigate for 31 days in hearing, but the parties argued both in the Wisconsin Supreme Court and in the Federal District Court for the Western District of Wisconsin regarding the rules of procedure and the rules of substantive law that were applicable.

6. Both defendants took the stand on their own behalf, gave testimony under oath, and were subjected to extensive cross examination by counsel for the State of Wisconsin.

7. Counsel for the State at all times during the course of this trial had at his disposal two City of Milwaukee detectives whom he used to assist him in the lining up of witnesses and whom he used for investigative purposes in preparing his own case and for investigating the testimony of witnesses for the defense. The two detectives were many times present with the attorney for the State at counsel table during the trial. Your affiant believes that counsel for the State had at his disposal and available for his use assistance from both the City of Milwaukee Police Department and from the office of the District Attorney of Milwaukee County.

8. Referee George H. Young presided over the 31 days of trial and had the opportunity to listen to and observe

all the witnesses who appeared and presented testimony both on behalf of the State and the defense.

9. Following the conclusion of the taking of testimony, a typewritten transcript of the record made during the 31 days of trial was prepared. The preparation of the transcript for the final day of hearing was completed sometime during the middle of November, 1969. Thereafter, the Honorable George H. Young, Referee, permitted the parties in excess of 30 days to study the written transcript in order to prepare for oral argument.

10. On August 18, 1969, the Honorable George H. Young heard counsel for the parties argue in excess of five hours. These arguments were directed to the question of what facts had been established in the case.

11. On August 18, 1969, counsel for the State submitted a 30 page brief arguing his contentions to the referee.

12. On January 9, 1970, the defendants by affiant submitted a brief which was 133 pages long and which was devoted exclusively to an argument of the facts. Within a week the State filed its reply brief of nine pages.

13. The referee's Findings, Report and Recommendation was filed with the Court on March 12, 1970, after the Honorable George H. Young had been able to devote almost two full months to its preparation and following the receipt of written briefs by counsel. Prior to rendering his Findings, Report and Recommendation, the referee had sat for 31 days and closely listened to the evidence and had observed and listened to the witnesses. In addition, he had the benefit of having had a completed, typewritten transcript available to him from the middle of November, 1969. Thereafter he had the benefit of listening to five

hours of arguments of counsel all relating to the facts in the case. Thereafter he had the benefit of three briefs of counsel and the opportunity to study for two months, having fully heard from them. The Findings, Report and Recommendation of the Honorable George H. Young, Referee, are attached hereto.

14. In the Findings, Report and Recommendation, the referee has found that the defendants did not engage in the conduct nor commit the acts charged against them by the State of Wisconsin. In his Findings the referee indicated that two of the principal witnesses called by the State were untruthful.

15. The State of Wisconsin, by its motion which was filed with this court on or about March 30, 1970, has moved the Court for judgment on the basis that the charges found in the complaint herein are "proven and true".

16. To permit the State of Wisconsin to make such a contention is to permit the State to make the exact same contention it made before the Honorable George H. Young, Referee, which contention was totally rejected by the Referee.

17. To permit the State of Wisconsin to make such a a contention before this Court would be to permit the State to try its case a second time.

18. To permit the State of Wisconsin to make this contention before this Court would be to ask this Court to make a decision as to the facts in this case without having had any opportunity to see and observe the witnesses who gave their testimony.

19. A bar disciplinary proceeding has been recognized by the United States Supreme Court in *In Re Ruffalo,* 88 Sup. Ct. 1222, to be a quasi-criminal as well as an adversary proceeding. The Supreme Court of the United States has recognized the interest involved in a bar disciplinary proceeding may be every bit as severe as a criminal sanction. *Spevack v. Klein* (1967), 285 U. S. 511.

20. It is the defendants' contention in this matter that to permit the State to proceed on the motion that has been filed would constitute a denial of due process to the defendants, would in fact be requiring that they be twice put in jeopardy for the same allegations, and finally, would be a denial to these defendants of that fairness which is basic to our system of justice.

/s/ RICHARD L. CATES
Richard L. Cates

[Subscribed and sworn to by Richard L. Cates on April 9, 1970.]

* * *

[ORDER (regarding briefing in Wisconsin Supreme Court) —not printed.]

* * *

ORDER [—formal parts omitted.]

The defendants have filed a motion to dismiss the complaint on the ground the Referee's findings are binding upon this court. Because this motion is based upon a misconception of the nature of a disciplinary proceeding in this court and the function of the Referee appointed in this proceeding, see *State v. Preston* (1968), 38 Wis. 2d 582, at page 588c,

IT IS ORDERED, that the defendants' motion to dismiss is denied.

IT IS FURTHER ORDERED, that all questions of law which the parties desire to raise in this proceeding shall be stated in their briefs and argued at the time the motions relating to the Referee's report are heard in September, 1970.

Dated at Madison, Wisconsin, this 13th day of April, 1970.

BY THE COURT:

/s/ Franklin W. Clarke
Franklin W. Clarke
Clerk

* * *

MOTION TO STRIKE, OR IN THE ALTERNATIVE, TO PERMIT PLAINTIFF TO FILE SUPPLEMENTAL AFFIDAVITS AS A PART OF PLAINTIFF'S APPENDIX

[—formal parts omitted.]

NOW COMES, the Plaintiff above named, by its counsel, Rudolph P. Regez, and moves the Court for an order striking from Defendants' Appendix as filed with their Brief herein, the Affidavit of Richard L. Cates (Defendants' Apendix page 102), the Affidavit of Edward G. Grosse (Defendants' Appendix page 104), and the Affidavit of Paul D. Lawent (Defendants' Appendix page 108), and as an alternative motion if the foregoing motion be denied;

Plaintiff moves the Court for an order permitting it to file as a supplement to Plaintiff's Appendix on file herein, the following exhibits which are attached hereto:

Exhibit A—Sworn statement of Richard C. Harvey, Jr.;

Exhibit B—Sworn statement of Richard Wesnick;

Exhibit C—Sworn statement of Jane A. Sikes;

Exhibit D—Sworn statement of Milton Hagopian.

Attached hereto and made a part hereof with the same force and effect as those set out in full, in support of this motion, is the Affidavit of Rudolph P. Regez and sworn statements above identified.

Dated at Monroe, Wisconsin, this 20th day of August, 1970.

BOARD OF STATE BAR
COMMISSIONERS

RUDOLPH P. REGEZ
Counsel

AFFIDAVIT [—formal parts omitted.]

Rudolph P. Regez, being first duly sworn, deposes and states:

1. That he is attorney for the Plaintiff herein and make this Affidavit in support of Plaintiff's motion to strike certain Affidavits from Defendants' Appendix filed with their Brief herein;

2. That on December 16, 1969, Defendants moved George H. Young, Referee, for an order opening the record to take newly discovered evidence and in support of that motion filed with the Referee the Affidavits of Richard L. Cates, Edward G. Grosse and Paul D. Lawent, all as set forth at pages 102-110 of Defendants' Appendix filed with their Brief;

3. That such motion was made shortly before final oral arguments scheduled before the Referee for December 18, 1969, and that time did not permit Plaintiff procuring Affidavits to opposition to such motion, although Plaintiff's investigation at that time showed the Affidavits to be without merit and of no substance;

4. That affiant advised the Referee of the information which he had in opposition to the motion and filed unsworn statements with the Referee, which affiant had taken by telephone, and that at the opening of the hearing on December 18, 1969 and without hearing statements from counsel, the Referee denied Defendants' motion to open the record;

5. That to permit the Affidavits of Richard L. Cates, Edward G. Grosse and Paul D. Lawent to be made a part of the Appendix gives them substance as evidentiary matter, a result which is not warranted by the entire record.

/s/ RUDOLPH P. REGEZ
Rudolph P. Regez

Counsel for the Board of State
Bar Commissioners

[Subscribed and sworn to by Rudolph P. Regez on August 20, 1970.]

"EXHIBIT A"

[AFFIDAVIT—formal parts omitted.]

RICHARD G. HARVEY, JR., being first duly sworn by Rudolph Regez, notary public, in and for Green County, Wisconsin, testified as follows:

My name is Richard G. Harvey, Jr. I am the County Judge of Racine County Court Branch III. I was appointed County Judge June 3, 1968; and in July I wanted to take the entire staff, court officers and other court attaches to

Milwaukee to observe the functioning of the traffic and misdemeanor courts. It happened that July 30 was clear, so I arranged a trip and took the two city court officers, Captain Milton Hagopian and Lieutentant George Povkovich; the Sheriff's court officer, Sergeant Nile Fuller; the deputy clerk, Miss Sarah Asdigian; my court reporter, Miss Jane Sikes; a reporter from the Racine Journal-Times, Mr. Richard Wesnick; and an Assistant District Attorney, Mr. Paul Lawent.

We drove to Milwaukee in two cars and went to the Safety Building and went first into Judge Krueger's court after meeting Mr. Flemming, the Chief Clerk in Milwaukee.

I was in Judge Krueger's court for possibly a half an hour before I left and went to Judge Seraphim's court and later to Judge Duffey's court. I think I was possibly sitting in the jury box. At any rate, from time to time, Judge Krueger would talk to me in a conversational fashion. We heard several trials, and there was some discussion of the new traffic citation. Judge Krueger mentioned that he expected problems with it. He stated that he had been appointed to some committee of five, as I recall it, by the Motor Vehicle Department. He appeared to be somewhat amused by the fact that he had been selected for the committee, because he said he had had his differences with the Department over making indeterminate findings of speed in some cases.

While I was there in court, an attorney presented an affidavit of prejudice, which provoked some humorous remarks from Judge Krueger. I later saw this same attorney in Judge Duffey's court trying the case in question. He was a young man. I don't know his name, but I am certain it was not Alan Eisenberg, because I know him. I had known Alan Eisenberg for at least a year prior to the day I was in Judge Krueger's court. I heard no mention by Judge Krueger or anyone else in that courtroom of any of the Eisenbergs on that day.

MR. REGEZ: Did you heard the name Ed Cameron mentioned?

JUDGE HARVEY: No, I didn't hear Ed Cameron mentioned either.

MR. REGEZ: Is it possible that you just don't remember?

JUDGE HARVEY: It's not a question of not remembering whether or not Judge Krueger made a statement about appointing a committee. It is a fact of which I am absolutely certain that he made no such statement or anything like it in my presence.

MR. REGEZ: Now, Sir, were you interviewed by a Mr. Grosse of the office of Lawton and Cates sometime in the early part of December of 1969 concerning the Eisenberg case pending in the Supreme Court and the events of July 30, 1968?

JUDGE HARVEY: Yes, I was.

MR. REGEZ: Mr. Grosse in an affidavit quotes you as follows, and I would like to read the exact quote from Mr. Grosse's affidavit: "Your affiant discussed Assistant District Attorney Lawent with Judge Harvey of Racine. Affiant specifically asked whether or not Judge Krueger had made the statement concerning appointing the Eisenbergs to the advisory committee. Judge Harvey said that he did not recall Judge Krueger mentioning names. That

Judge Harvey recited that he felt Assistant District Attorney Lawent is a very responsible and reliable individual and that if he said he heard such a remark in the courtroom that he (Judge Harvey) believes that it was said by Judge Krueger." Now, Sir, will you please comment upon that statement by Mr. Grosse?

JUDGE HARVEY: That statement is not correct. What I told Mr. Grose was in response to a question from him, was that I felt Paul Lawent was reliable, and that's all I said.

MR. REGEZ: You made no statement that if Lawent said that a committee was appointed that it must have been said?

JUDGE HARVEY: I didn't make any such statement.

MR. REGEZ: Judge Harvey, after you were interviewed by Mr. Grosse and subsequently I called you concerning the events of July 30 in December of 1969; isn't that true?

JUDGE HARVEY: Yes.

MR. REGEZ: Did you then make it a special point of discussing the July 30 events with the other people who had accompanied you?

JUDGE HARVEY: Yes, I did. I tried to check my memory on the matter with everyone available who had been there.

MR. REGEZ: Did anyone of the persons that accompanied you and with whom you talked have any recollection of Judge Krueger mentioning the Eisenbergs and Cameron in his courtroom that day?

JUDGE HARVEY: No.

MR. REGEZ: Absolutely none? Can you be that emphatic?

JUDGE HARVEY: Yes. That's true, absolutely none.

MR. REGEZ: Now, Judge Harvey, tell us, if you know, whether or not Mr. Lawent and Mr. Eisenberg were friends or acquaintances or otherwise?

JUDGE HARVEY: Well, I knew that they were acquainted. I didn't know how friendly Paul was with him, but I know that he knew him from remarks that he made when Eisenberg had been in our court, which I believe was prior to the day we went to Milwaukee.

MR. REGEZ: After Judge Krueger's suicide, did Paul Lawent ever discuss with you the events of July 30, 1968?

JUDGE HARVEY: No, he didn't. He didn't talk to me.

MR. REGEZ: Thank you.

I have read the above and foregoing and the same is correct.

Dated at Racine, Wisconsin, this 17th day of August, 1970.

/s/ Richard G. Harvey, Jr.
Richard G. Harvey, Jr.

"EXHIBIT B"

[AFFIDAVIT—formal parts omitted.]

RICHARD WESNICK, being first duly sworn by Richard G. Harvey, Jr., County Judge, testified as follows:

EXAMINATION BY MR. REGEZ

Q Will you state your name, home address, and occupation?

A Richard James Wesnick, W-e-s-n-i-c-k, age 31, home address 2913 Drexel Avenue, D-r-e-x-e-l, Racine, Wisconsin. I am employed as a reporter for the Racine Wisconsin Journal-Times.

Q And were you employed as a police reporter for that paper on July 30, 1968?

A Yes, I was.

Q Do you recall where you went July 30 of 1968?

A I accompanied Judge Richard G. Harvey and several other people to Milwaukee for a tour of the Safety Building.

Q It was in the nature of an orientation tour for Judge Harvey and some of his court personnel?

A That's correct.

Q Did you go to Judge Krueger's courtroom on that day?

A Yes, we did.

Q Do you recall any particular attorney that was with you that day?

A There was Paul Lawent, who was Assistant District Attorney for Racine County.

Q At that time?

A Yes.

Q Did you personally see Mr. Lawent while you were in Judge Krueger's court?

A Yes.

Q Tell us where you saw him in that courtroom?

A Paul Lawent and I sat together along with Judge Harvey and the other members of Judge Harvey's court who were making the tour, in a jury box to the left of the Bench. That would be as the Judge faces the courtroom, we were to his left.

Q And you sat beside Mr. Lawent in the jury box?

A I could not swear to that. I don't recall who I was sitting next to, but I was with Paul a great deal of the time, and it's quite possible although I cannot be certain, that we were sitting together.

Q Did you leave Judge Krueger's court with Mr. Lawent?

A Yes, I did.

Q Did you hear any comments by Judge Krueger concerning the Uniform Traffic Citation?

A I believe I did.

Q Do you recall what he said about it?

A No.

Q Did you hear any discussion by Judge Krueger concerning a committee he was contemplating?

A No.

Q Did you hear him mention the names of any persons in connection with such a committee?

A No.

Q I read to you, Sir, an exact quote from an affidavit given by Paul D. Lawent. "That on July 30, 1968, your affiant and others were observers in Judge John A. [sic] Krueger's courtroom in the City and County of Milwaukee, State of Wisconsin. That on that date, your affiant while sitting in the jury area of the above-named courtroom observed Judge John A. [sic] Krueger turn his head toward your affiant and says words to the effect that 'because of problems that will be caused by the Uniform Traffic Citation, I am considering appointing an advisory board to this court consisting of Sydney M. Eisenberg, Alan Eisenberg and Ed Cameron.' " Now, Sir, that is from an affidavit made by Mr. Lawent. Will you please comment on that statement?

A I don't personally recall any statement to that effect. I don't recall having heard the names of Alan Eisenberg or Sydney Eisenberg or Ed Cameron. I know Alan Eisenberg personally, and I feel that if I had heard the name, I would have taken note of it.

Q Now, Mr. Wesnick, do you recall the events of August of 1968 involving Judge Krueger?

A That was the time he shot himself in his chambers.

Q Yes. Do you recall the vast publicity about the events surrounding that shooting?

A Yes, I do.

Q Do you recall that at that time much comment was made of the committee which he had appointed; namely, Alan and Sydney Eisenberg and Edward Cameron?

A Yes, I do.

Q And that situation was approximately three or four weeks after you were in Judge Krueger's courtroom; is that right?

A Yes, it is.

Q Now, as a police reporter, did you take an interest in this proceeding?

A In the death of Judge Krueger?

Q Yes.

A Yes, I did.

Q Did those events bring back the visit that you had had in his court a few weeks ago prior thereto?

A Yes. I recalled our earlier visit to Judge Krueger's court and was upset by the incident. I feel that I recall most of what transpired in that courtroom on that day and I don't recall any mention of the Eisenbergs or Ed Cameron.

Q Isn't it true Sir, having just been in that courtroom a few weeks before Judge Krueger killed himself and hearing of the Eisenberg-Cameron committee at the time that Judge Krueger killed himself, that if anything had been said on July 30, 1968, concerning the committee that you would not only have recalled it but would have reported it to someone or other?

A Yes, I certainly feel that I would have used the information, if not for our own newspaper purposes, for the purpose of reporting to authorities in Milwaukee.

Q And as a police reporter, if you had heard such a statement, that would be news, would it not?

A Yes, it would.

Q And something that you would have recalled when it was that fresh in your memory?

A Yes.

Q With whom did you leave Judge Krueger's courtroom?

A I left with Paul Lawent.

Q And where did you go?

A We went to the press room in the Safety Building.

Q And did you and Mr. Lawent see anybody in that press room?

A Yes, there were several reporters in there and Attorney Alan Eisenberg was there.

Q What is the fact as to whether or not Mr. Lawent and Mr. Eisenberg seemed to be acquainted?

A They greeted each other and discussed points of mutual interest such as the law and law school and their activities since graduation from law school They seemed to have been acquainted.

Q As a court reporter and if you had heard Judge Krueger mention the name Alan Eisenberg in his courtroom, what would you have done when you then met him personally that same day?

A I probably would have raised the point with Alan and questioned him about it, but I didn't because I don't believe the point was ever raised in Judge Krueger's court.

Q Have I explained to you, Mr. Wesnick, that my purpose in taking this deposition is to present it to the Supreme Court in connection with the case presently pending in that court against Alan and Sydney Eisenberg?

A Yes, you have.

MR. REGEZ: Thank you. All right.

I have read the above and foregoing, and the same is correct.

Dated at Racine, Wisconsin, this 17th day of August, 1970.

/s/ RICHARD WESNICK
Richard Wesnick

"EXHIBIT C"

[AFFIDAVIT—formal parts omitted.]

JANE A. SIKES, being first duly sworn by Richard G. Harvey, Jr., County Judge, deposes and states:

That she is 24 years of age, resides at 426 Three Mile Road in the City and County of Racine, State of Wisconsin, and is employed as a court reporter by Racine County in County Court Branch III, Judge Richard G. Harvey, Jr., presiding.

Deponent further deposes and states that on July 30, 1968, your affiant and other observers from Racine County, Wisconsin, attended Judge John A. [*sic*] Krueger's courtroom in the City and County of Milwaukee, State of Wisconsin.

Deponent further deposes and states that subsequent thereto and on or about December 3 or 4, 1969, she was interviewed at Racine County Courthouse by a person who represented that he was an attorney for the Eisenbergs, who questioned her about attending as an observer at Judge Krueger's courtroom.

Deponent further deposes and states that she is not certain that he identified himself as an attorney, but he did indicate that he was connected with the Eisenberg case.

Deponent further deposes and states that she specifically did not tell the person who interviewed her concerning this situation that she heard Judge Krueger make any remark about appointing any people to any committee and that she does not now have any recollection of Judge Krueger making any such comment.

Deponent further deposes and states that she has read of the Eisenberg case in the newspapers, heard it on television and radio and that if she has indicated a knowledge of any committee or otherwise, that she cannot determine whether or not that such knowledge could have come to her from those sources rather than any other.

Deponent further deposes and states that she recalls Judge Krueger stating something to the effect that he had been named to a committee relative to the Uniform Citation Act, and that her recollection of that statement resulted from a conversation with her employer, Judge Richard G. Harvey, Jr., who recalled Judge Krueger specifically making that remark.

Deponent further deposes and states that when she was interviewed in December of 1969 concerning this situation, the person who interviewed her asked her if she remembered any remarks that Judge Krueger made and that she said to him, "I don't remember much, and what I remember, I don't remember if I read it in the paper, heard it on TV, heard it in court, or Judge Krueger said it. I can't recall that the Judge did say it."

Deponent further deposes and states that she gives this affidavit at the request of Mr. Rudolph P. Regez, who identified himself as Counsel for the State Board of Bar Commissioners.

Dated at Racine, Wisconsin, this 17th day of August, 1970.

/s/ Jane A. Sikes
(Miss) Jane A. Sikes

[Subscribed and sworn to by Jane A. Sikes on August 17, 1970.]

"EXHIBIT D"

[AFFIDAVIT—formal parts omitted.]

MILTON HAGOPIAN, being first duly sworn by Richard G. Harvey, Jr., County Judge, testified as follows:

EXAMINATION BY MR. REGEZ

Q Your name, position, home address?

A Milton Hapogian, Captain of Police, Racine Police Department, 2205 Savoy Circle, Racine, Wisconsin.

Q And how long have you been associated with the Racine Police?

A Twenty years and eight months.

Q Were you in Milwaukee on an orientation visit on July 30, 1968?

A Yes.

Q Now, Sir, were you in Judge Krueger's courtroom that day?

A Yes, I was.

Q Were you in the company of Judge Harvey, court reporter Jane Sikes, Assistant District Attorney Paul Lawent, among other?

A Yes, I was.

Q How long were you in Judge Krueger's court

A Half hour, if we were there that long.

Q Was Sarah Asdigian there?

A Yes, she was.

Q Where did she sit?

A She sat up by the clerk, Judge Krueger's clerk, right below the Judge.

Q A similar position to which she then held in Racine County?

A Right, she was a deputy clerk here.

Q How long were you in Judge Krueger's courtroom?

A I would estimate about a half hour.

Q How long was Paul Lawent there?

A Well, I thought he was in there with me; I mean, with us, at the same time.

Q To your recollection did he leave when you left?

A I believe so. Yes.

Q Did you hear Judge Krueger make any comment about the Uniform Citation Act?

A Yes, he made a mention of the Uniform Citation that was coming out.

Q What, if anything, did he say concerning a committee, if you recall?

A Well, that he did state that there was a committee appointed for this Uniform Traffic Citation, and that to me it sounded like it was a big joke, because he was appointed to that committee, and he couldn't understand why he should be appointed.

Q In other words, he made a comment that he had been appointed to a committee?

A That's right.

Q Did he then make some remark to the effect that it was humorous that he was appointed of all people?

A Yes.

Q Did you hear him discuss any other committee or particularly a committee that he might appoint?

A No.

Q Did he mention the names of any attorneys or individuals that you can recall?

A No, the only— He didn't mention any names, but there was the one attorney that came up there with an affidavit of prejudice. I imagine it was an affidavit. I knew it was an affidavit of prejudice. He even turned around to Judge Harvey and he said, now this law firm they mimeograph these or how do you do this, counsel, and the counsel said, we mimeograph, and he said, yes, they mimeograph theirs so they don't have to make fresh ones all the time.

Q Do you know who that attorney was?

A I never saw him— I saw him a half—up later in Judge Duffey's court.

Q Do you know Alan Eisenberg?

A Yes, I do.

Q Was it Attorney Alan Eisenberg?

A No, it wasn't Alan Eisenberg.

Q Did you have a discussion with Paul Lawent early in December of 1969 concerning your visit to the Krueger court?

A Yes, I did have a conversation.

Q How did that conversation come about?

A Well, Paul called me.

Q Paul Lawent?

A Yes. Lawent called me and he asked me if I knew anything about this committee that Judge Krueger had appointed, if I had heard him name them when we were up there.

Q On July 30?

A On July 30, and I told him that I didn't know a thing about the Judge naming any committee, that I know now because I read it in the paper. And if I'm not mistaken, I think the first time I read it in the paper about Judge Krueger appointing a committee was when he committed suicide—when he shot himself. That's the first time I ever heard about it.

Q Did you tell that to Mr. Lawent?

A Yes, I did.

Q Did Lawent specifically ask you if you had heard Judge Krueger on July 30 mention the names of Alan and Sydney Eisenberg and Ed Cameron?

A I think it was Lawent the one that specifically named them all. Yes, that was Lawent that asked me if I knew about it, and I said yes. Lawent asked me if I knew that he appointed Alan Eisenberg and Sydney and this other fellow, and I said no I didn't hear Judge Krueger mention it. I would have remembered it, because I do know Alan Eisenberg, but there was no names mentioned.

Q When?

A When we were in Krueger's court.

Q When?

A On July 30.

Q Now, Sir, you state that you know Alan Eisenberg?

A I know of him, yes.

Q Did you know of him on July 30, 1968, when you were in Judge Krueger's court?

A Yes, I did.

Q And it is for that reason you now state that if his name had been mentioned you would have remembered it?

A I certainly would have.

Q Captain, what kind of a memory do you have, if you know?

A I take pride in my memory, because working in court with the attorneys, which at least, there is at least six or ten attorneys that are continually in traffic court, I know their telephone numbers by heart, the State Statute book from Section 340 thru 349 I know practically everyone of them by heart, very few of them do I have to look up. I know my City Ordinances by heart pertaining to the City Code on traffic and misdemeanors, because I have to sign all the complaints, and I learned to memorize them so I don't have to keep looking them up all the time.

Q Captain Hagopian, I have advised you that your statement is taken by me for the purpose of presenting it to the Supreme Court in an action pending in that court against Alan and Sydney Eisenberg; is that right?

A Yes, it is.

I have read the above and foregoing, and the same is correct.

Dated at Racine, Wisconsin, this 17th day of August, 1970.

/s/ Milton Hagopian
Milton Hagopian

* * *

MOTION FOR EXTENSION OF TIME [—not printed.]

* * *

STIPULATION FOR EXTENDING DEFENDANTS' TIME TO ANSWER [—not printed.]

* * *

RESPONSE TO THE MOTION OF THE STATE TO STRIKE DEFENDANTS' APPENDIX AND TO ACCEPT THE STATE'S AFFIDAVITS IN SUPPORT THEREOF, AND MOTION [—formal parts omitted.]

COMES NOW the defendants by their attorneys, Lawton & Cates and Richard L. Cates and in support of their response to the State's motion and in support of defendants' motion, hereby respectfully submits to the Court as follows:

1. The state by its motion to strike and submission of supporting affidavits raises the question of the merit of its key charge against the defendants to the effect that they forced Judge Krueger against his will to appoint them to an advisory committee, in light of the affidavit of Assistant District Attorney Paul Lawent.

2. The State opposed the effort of the defendants to take testimony by the Referee regarding this newly discovered evidence and as the State's own affidavits show submitted only unsworn proof in opposition before the Referee. The State opposed defendants' effort to have the issues raised by the Lawent affidavit fully heard by the Referee.

3. The Referee *conditionally* denied defendants Motion to open the record, reserving the right to reconsider if the material took on significance. The Referee's finding on the record, that the defendants did not force Judge Krueger to appoint them to an advisory committee rendered defendants' motion to open the record insignificant.

4. Now at this late hour the State in support of its motion, contends that if the matter contained in the affidavit of Assistant District Attorney Lawent is true, then its charge against defendants that they forced Judge Krueger to do an act against his will is, in the State's own words ". . . largely without merit". The State now advances this position despite the fact that it had resisted the defendants' motion for the Referee to hear evidence in this respect.

5. After the lengthy trial and after having heard and observed the witness and with aid of five hours of oral argument and extensive briefing by both parties, the Referee has found as a fact that the defendants did not engage in the conduct with which they are charged and that they should not be disciplined.

6. In light of all of the foregoing if this Court determines and decides to adopt the findings and recommendations of the Referee the entire matter raised by the motion of the State regarding the affidavit of Assistant District Attorney Lawent is moot and no action need be taken thereon.

7. If this Court determines that the record in this case supports facts warranting any disciplinary action the matter must be remanded for further evidentiary hearings to afford the defendants due process. This flows from the fact that State now concedes that if the affidavit of Assistant District Attorney Lawent is true, the claim that the Eisenbergs forced Judge Krueger to do an act against his will is ". . . largely without merit".

WHEREFORE, the defendants move the court to withhold decision on the State's motion to strike pending a determination by it on the merits of the Referee's report and in the event this court determines not to adopt the findings and recommendations of the Referee that it then remand the matter to the Referee for further evidentiary hearings regarding the Lawent affidavit.

Respectfully submitted,

LAWTON & CATES

/s/ RICHARD L. CATES
By: Richard L. Cates

/s/ JOHN H. BOWERS
John H. Bowers

* * *

[UNTITLED PLEADING—formal parts omitted.]

1. Affidavit of Michael Bresette [*sic*].

2. Letter from Attorney Richard L. Cates to Attorney Rudolph Regez dated July 8, 1970.

3. Letter from Attorney Rudolph Regez to Attorney Richard L. Cates dated July 10, 1970.

4. Letter from Attorney Rudolph Regez to Attorney Leonard Loeb.

[AFFIDAVIT—formal parts omitted.]

MICHAEL BRESSETTE, being first duly sworn on oath, deposes and says to the Court as follows:

1. That he was born on June 5, 1944, and lives at 1606A North 29th Street, Milwaukee, Wisconsin.

2. That on June 24, 1970, your affiant approached Alan D .Eisenberg in the Safety Building on 9th and State and told him that he wanted to talk to him about his prior testimony that your affiant gave during the Bar Hearings against Alan D. Eisenberg in the summer of 1969;

3. Your affiant states further that on the morning of the day after Jackie Weiland testified, your affiant read an account of her testimony in the Milwaukee Sentinel;

4. Your affiant states further that your affiant received a telephone call from Attorney Ed Cameron later that same day of Wednesday, August 20, 1969;

5. Your affiant states further that at that time Ed Cameron had told your affiant that Mrs. Weiland had testified that Ed Cameron had "beat her out of some money".

6. Your affiant states further that Ed Cameron then instructed your affiant that your affiant should take the stand himself and testify against Mrs. Weiland and the Eisenbergs and, further, that your affiant should testify that your affiant had heard that the Eisenbergs had promised to get Clarence Harris out of jail if Clarence Harris would testify against Ed Cameron; your affiant states further that Ed Cameron then told him that he would send two

(2) men over to talk to him about Judge Krueger's death, and what Jackie Weiland had said on the stand; Your affiant states further that Mr. Cameron did not tell your affiant that the two (2) men he was to be sending over would be Milwaukee Police Officers;

7. Your affiant states further that same evening at approximately 6:00 P. M. two (2) men, who identified themselves as Milwaukee Police Detectives came to your affiant's home; one identified himself as Blackburn, and the other Detective's name, your affiant does not remember, but he was approximately six (6) foot two (2) and weighed about 240 pounds, and he was bald, and he stated that he was Blackburn's partner;

8. Your affiant states further that these two (2) Detectives then told your affiant that they had been sent by Ed Cameron; your affiant states further that Detective Blackburn stated that Alan D. Eisenberg was "a little Prick" and that they wanted to get him out of the Courts and that they wanted to ruin him so that he would not be able to practice in Wisconsin anymore; your affiant states further that Detective Blackburn was the individual who did all of the talking, and the other Detective just stood by and nodded in agreement;

9. Your affiant states further that Detective Blackburn then told your affiant to testify that he had heard from Jackie Weiland that the Eisenbergs had promised to get Clarence Harris' prison term reduced if he testified against Cameron; your affiant states further that in the first place, Jackie Weiland never did tell your affiant that she had heard that the Eisenbergs had promised to get Clarence Harris' prison term reduced if he testified against Cameron; your affiant states further that he had never

heard Jackie Weiland even tell him anything like that, or to that effect;

10. That your affiant states further that when he took the stand and testified to these facts, he was lying as a favor to Ed Cameron because Ed Cameron is a very good friend of his, and your affiant states further that he never had to pay Ed Cameron any fees, at any time, for going to court; your affiant states further that the only reason he testified to the statement that "Jackie Weiland had told him that the Eisenbergs had promised to get Clarence Harris' prison term reduced if he testified against Ed Cameron" was completely because Ed Cameron had told him to make that statement, and not because that statement was true; the statement that your affiant had made on the stand regarding this matter, and Mrs. Weiland's statement was, in fact, false; your affiant states further, that your affiant did, therefore, knowingly lie under oath during the Bar Hearings as a favor to Ed Cameron; your affiant states further that he never would have taken the stand and lied under oath except for the fact that Ed Cameron told him to do this and Mr. Cameron subsequently, sent over two (2) police officers who told him to do this; and your affiant states further that said same police officers told your affiant that nothing would happen to him because of this lie; your affiant further states that he never would have testified and lied as he did on this matter if Ed Cameron had not told him to do so, and the particular police had not told him to do so without anything happening to him;

11. Your affiant states further that he believes that both police officers involved knew, also, that your affiant would be testifying to lies;

12. Your affiant states further that he has read this statement before signing it; that he has given it freely and voluntarily; that nothing has been promised him; that he has been in no way coerced, or threatened, and that the entire conversation that your affiant had with Alan D. Eisenberg, in this matter, was, at all times, and completely, in the presence of Cheryl L. Duvall, Russell Stewart and Nora Hytery; your affiant states further that the only discussion that your affiant had, ever, with Alan D. Eisenberg about the facts underlying his testimony in the Bar Hearings was had in Alan D. Eisenberg's office in the presence of the aforenamed persons between 11:30 A.M. and 12:30 P.M. on June 24, 1970; your affiant states further that he had never discussed this with Alan D. Eisenberg on any other occasion and that he has come forth and given this statement freely and voluntarily because it has bothered his conscience ever since he originally testified in the Bar Hearings;

13. Your affiant states further that he, subsequently, saw the second Detective at the "Spa" Tavern at 5th and Wisconsin and said Detective told him that the Detective now owed your affiant a favor; your affiant states on information and belief that he believes the Detective's name was Koehler.

/s/ MICHAEL BRESSETTE
Michael Bressette

[Subscribed and sworn to by Michael Bressette on June 24, 1970.]

WITNESSED BY:

/s/ RUSSEL L. STEWART
/s/ NORA M. HYTRY

Mr. Rudolph Regez
1502—10th Street
Monroe, Wisconsin

July 8, 1970

Re: *State of Wisconsin v. Eisenberg*

Dear Rudy:

Enclosed please find an affidavit of Michael Bressette. As you can see, he has indicated in this affidavit he perjured himself in giving his testimony in the Eisenberg case. He also clearly indicates that Mr. Cameron asked him to do this. I have not talked to Bressette. I did not know anything about this until Alan told me. He immediately reported it to the district attorney for Milwaukee County.

I have had a difficult time trying to determine what my responsibility was as it related to this affidavit. As you well know, I have taken the position that it was apparent on the face of Bressette's testimony that he had been untruthful. I also felt that he was much more helpful to the defense than the prosecution.

I spoke to Wade Boardman this morning about this. I wanted to have his advice in part because the contents of this affidavit involved an attorney and I felt that I had some responsibility in the light of what facts I had learned about Mr. Cameron to report this matter to Mr. Boardman. He was very kind. He did not want to see the affidavit. I told him that I felt I had to make the affidavit available to you because it involved a witness you called. He felt this was appropriate and suggested I do just that. I, therefore, am sending this affidavit to you (1) because I concluded myself you had to have a copy, and (2) now because Wade Boardman felt it appropriate that I do this also.

Very truly yours,

RICHARD L. CATES

RLC:nh
Enc.

July 10, 1970

Mr. Richard L. Cates
Attorney at Law
110 East Main Street
Madison, Wisconsin

Dear Dick:

Re: State vs. Eisenberg

This acknowledges copy of Bressette affidavit relating to his testimony in the above matter.

I am sending a copy of your letter and the affidavit to the State Bar Grievance Committee for Milwaukee County with the request that an investigation be made.

If you will read Bressette's testimony you will see that Detective Koehler did not accompany Detective Blackburn when the Bressette statement was taken.

Bressette, in his affidavit, states that both Blackburn and Koehler were present. There appear to be other glaring inconsistencies. For instance, at Page 3907 of the transcript Bressette was asked this question:

> "Q. When Mr. Blackburn came over to the house—incidentally, was it Mr .Blackburn or this gentleman sitting right behind me?
>
> A. I said Mr. Blackburn. I didn't even know Mr. Blackburn's partner until today."

(I believe Detective Koehler was the person referred to as "gentleman sitting right behind me")

Mr. Richard L. Cates, Page 2 7/10/70

When the inconsistencies are considered, the whole affidavit strains one's credulity, and particularly Bressette stating under oath in the affidavit:

> "your affiant states further that he has never discussed this with Alan D. Eisenberg on any other occasion and that he has come forth and given this statement freely and voluntarily because it has bothered his conscience ever since he originally testified in the Bar Hearings;"

Very truly yours,

/s/ Rudolph P. Regez
Rudolph P. Regez
1502 Tenth Street
Monroe, Misconsin

RPR: A

cc Mr. Leonard L. Loeb
Mr. Robert Harland
Mr. W. Wade Boardman
Mr. Michael McCann

July 10, 1970

Mr. Leonard L. Loeb
Attorney at Law
152 W. Wisconsin Avenue
Milwaukee, Wisconsin

Dear Mr. Loeb:

Enclosed find copy of letter and affidavit today received by me from Mr. Richard Cates, attorney for Sydney M. and Alan Eisenberg.

Taking the affidavit at its face value requires an investigation which I believe should be made in the first instance by the State Bar Grievance Committee for Milwaukee County. For that reason the enclosures are sent you with the request that your committee consider the same. I shall be pleased to make myself or any information which I may have available to the committee.

I have discussed this situation with Mr. McCann, District Attorney for Milwaukee County, and he states that he is completely agreeable that the grievance procedures be instituted even though the matter was referred to his office by Alan Eisenberg.

I discussed this matter by telephone with Mr. Robert Harland this morning as I was under the impression that he was chairman of the Milwaukee County committee but he informed me that you now hold that position.

Very truly yours,

/s/ R. P. R.

Rudolph P. Regez
1502 Tenth St.
Monroe, Wisconsin

RPR: A

* * *

AFFIDAVIT [—formal parts omitted.]

ROBERT E. COOK, being first duly sworn, on oath deposes and says:

1. I am a member of the State Bar Grievance Committee, District 4, and as such the affidavit of Michael Bressette of June 24, 1970 was referred to me for investigation.

2. I have interviewed Milwaukee Police Detectives Robert Blackburn and Ray Koehler. My notes concerning said interview are attached hereto as Exhibit "A".

3. I have interviewed Attorney Edward R. Cameron concerning this matter. My notes concerning this interview are attached hereto as Exhibit "B".

4. On September 17, 1970, I contacted Michael Bressette at Milwaukee telephone number 384-2165, which I am informed is the telephone number for the Milwaukee Bombers Gym. I asked Bressette to come to my office for an interview after having described to him my role in this investigation. He stated that he didn't want to come without his lawyer and I invited him to come and bring his lawyer. He then stated he wanted his manager present also. I told him he was welcome to bring his manager also. He inquired if he was going to be compensated for this interview and I told him he would not. He stated he would consider the matter and contact me on or before 12:00 o'clock noon Thursday, September 17, 1970. At the date and time of making this affidavit (September 18, 1970, at 4:15 o'clock P. M.) Bressette has not contacted me or any members of my office.

5. That in view of the absolute denials of the allegations made by Bressette, by Police Officers Blackburn and Koehler, and Attorney Cameron, and the incongruity of Bressette now claiming, at this late date, that his false testimony has bothered his conscience, I conclude and recommend to the committee that no action be taken based

upon Bressette's affidavit and would conclude that his affidavit is not truthful.

/s/ Robert E. Cook
Robert E. Cook

[Subscribed and sworn to by Robert E. Cook on September 18, 1970.]

EXHIBIT "A"

August 20, 1970

FILE MEMO

Re: Grievance Committee
File No. 4-6-71

EDWARD R. CAMERON

August 17, 1970, conference with Detectives Robert Blackburn and Ray Koehler in my office from 1:55 p. m. to 2:30 p. m.

Bressette has done this in the past. He is an American Indian—5′10″ to 6′ tall—well built—age 26 or so. He has four judgments pending against him at the present time.

Koehler never met Bressette except for August 20, 1969. On that date he, together with Attorney Regez, assistant District Attorney Gardner and Blackburn took Bressette home from the court house. He had never been alone with him before and never met him before. Bressette had not yet testified. He did not have any conversation with him except for the introduction.

Blackburn is not sure how the information about Harris came to him. It may have been that Cameron called Blackburn and Blackburn then told Regez about it, in which event Regez would have told him to go out and investigate, or it may be that Cameron called Regez and Regez told him to go and investigate. In any event he interviewed Bressette at Bressette's home on August 18 (Monday). He didn't want to go in the house so he sat on the front porch. Prior to going, he discussed with Regez whether to take a partner with him but Regez had decided that he could go alone. In any event, he declined to go into Bressette's home and sat on the front porch with him. He knew Bressette and Bressette knew he was a police officer, but in any event, he showed him his credentials. Bressette's foot was in a cast at the time. Bressette told him he had hurt it at work and they talked about that.

Blackburn told Bressette that he was working for Regez on this investigation and took out his notebook. Bressette was not too happy with him taking notes so he asked him not to do it. As a result, Blackburn laid the notebook between Bressette and himself and did not make comprehensive notes but made a couple of notes as they went along.

Bressette stated that he thought Cameron was a good guy. He stated that Weiland had told him two or three weeks earlier that while she was visiting Clarence Harris at Waupun, Harris had said that the Eisenbergs had approached Harris and said that if he testified against Cameron, they would get Harris' sentence reduced. Blackburn reported this to Regez.

On August 20, Blackburn took Bressette to the court in the morning, took him home at noon along with the other people described, and took him back to the court after lunch and then Bressette testified, he believes, in the afternoon. Regez asked Blackburn to check out whether any member of the Eisenberg office had ever visited with Harris as alleged and so Blackburn started making a number of telephone calls to Waupun. He wasn't able to get everything he wanted over the telephone so Regez told him to go out there. He drove to Waupun that afternoon and spent the balance of that day with the officials in Waupun, checking out their records. He never talked with Harris while he was there. The records at Waupun did not show that any member of the Eisenberg staff had visited Harris.

Blackburn only saw Bressette once again since that time and that was when Bressette was under arrest for something or another and was in the line-up. Blackburn merely said hello to him. No conversation at all about this incident or any part of the Eisenberg trial.

Koehler saw Bressette once again and that was at the Spa. Koehler was working on a narcotics detail with (now Detective Lieutenant) Urban Rehberg. He only worked with Rehberg once so that if it is necessary he can consult his book and pinpoint this date. In any event this was sometime about 11:00 in the morning and they ran into Bressette. They never talked with Bressette about the Eisenberg hearings at all and only talked about Bressette's career as a boxer.

Both of the Detectives emphasized to me that the entire Eisenberg investigation was handled as a matter of utmost confidentiality. They did not even report their findings to their immediate superior but reported directly to Dave Cannon who was then District Attorney. They did not use any Stenographer in the Police Department but used a Stenographer that Cannon provided for them. They emphasized this fact by way of pointing out that it is highly unlikely that they would be so casual in talking to Bressette or anybody else about this investigation when they were handling it on such a confidential basis. Additionally, they were aware that Bressette had done time and was not a candidate for "man of the year" award and therefore contend that it is incredible that they would make statements to Bressette such as alleged by Bressette. Furthermore, Blackburn points out that in dealing with a person like Bressette, you "stay strictly to business. I was there to listen, not to talk".

Both of the Detectives assured me of their willingness to cooperate at any additional time in the future. I asked them to keep this investigation confidential and they both assured me that they would.

REC

EXHIBIT "B"

September 17, 1970

FILE MEMO

Re: Grievance Committee—File 4-6-71

EDWARD R. CAMERON

September 14, 1970, I interviewed Ed Cameron at my office. Bressette is a former client of his and he has represented him for 8 to 9 years in criminal matters and one personal injury. Bressette is an American Indian from the Bad River Reservation near Ashland, Wisconsin. He has a long record of battery's, is a narcotics user (smokes pot and may be using heroine), is a thief and generally an undesirable character. Most of his battery's are against his girlfriends and a number of them are against Jackie Weiland.

Weiland has illegitimate children by both Clarence Harris, Jr. and Lawrence Jr. Harris. These latter two are brothers. She apparently has some bastardy charges pending against one or both of these people at the present time. Cameron represented Weiland some time back and got an $8,000 settlement for her in a personal injury case when her head went through the window.

With reference to the fifth paragraph of Bressette's affidavit, that Cameron had "beat her out of some money" (referring to Weiland), Cameron states that this came about in this fashion. Bressette had gotten in some trouble in Ashland, Wisconsin in a fight with an Indian. He had smashed this man's jaw very badly and was charged with aggravated battery. He wanted Cameron to represent him. Cameron declined to do so unless he got a $500 retainer. Bressette got Weiland to give Cameron $500. Accordingly, Cameron and Bressette went to Ashland and appeared in Court. The charge was reduced from a felony to a misdemeanor by a reduction to battery or disorderly conduct, a guilty plea was entered and he was fined and placed on probation—the probation to be here in Milwaukee. Shortly after this hearing, Bressette beat up Weiland and she got a warrant out for him. The police captured him on this warrant after a fight. Weiland was unhappy with her relations with Bressette at this time and she wanted Cameron to give her back her $500. Cameron told her that he would not do so because the $500 was for Bressette and he had earned the $500.

With reference to the allegation in the affidavit that Cameron never charged him for any fees, he states that is a lie. He says Bressette never has any reluctance in calling him when he needs help and has called him frequently.

He has always received fees from Bressette and as late as November 21, 1969, Bressette paid him $200 in fees plus $65 for costs in some pending matter. Cameron had some statements with him at the time, and consulting them, said that Bressette had paid him other fees. He says that these are just a few statements he asked his secretary to get out for him before he came over to see me today.

With reference to the charge that he called Bressette, to ask Bressette to make up the story, he states he did not even know how to get ahold of him at the time. Bressette called Cameron after he read either Weiland's or Harris' testimony in the paper. He had a habit of calling Cameron "Uncle Ed". He said "Uncle Ed, I know all about this bit with that God damn bitch Jackie and it isn't all a bunch of lies". Cameron said he didn't want to talk about it and for Bressette to tell the police. Bressette said, well who will I talk to and Cameron told him that he would contact the appropriate officers and have them call him. Cameron was emphatic in not wanting to talk to Bressette.

Cameron states he then talked with either Blackburn or Koehler or Regez—he does not remember which.

Cameron states he did not even know at the time what it was that Bressette was going to or did testify about.

After the testimony, Bressette told him "I know Jackie was paid to testify". Cameron said "Find out and let me know. I'll tell you who to see". He has never been contacted by Bressette with this information.

Since the hearings, he has seen Bressette a couple of times. One time was when Bressette got into trouble with Able Monreal. Apparently, Bressette spit in Able's face in some pizza place in town. Bressette knew that Cameron represented the Monreal family and he was afraid that Nick Monreal, who is a member of the police department, might arrest him and use the arrest as a pretext to get some sort of revenge against his spitting in Able's face. Cameron said he would talk with the Monreal's and straighten this out. He took Bressette to Able Monreal's tavern one Saturday afternoon, Bressette apologized to Able and they got their differences straightened out.

Cameron last saw Bressette about 1½ months ago at a place known as the Ski Hut. Cameron had returned from a golf outing with some tavernkeepers association and saw Bressette there. Bressette said nothing to him about these accusations. Bressette may be available at the Milwaukee Bombers Gym, 384-2165 between the hours of 4 to 8 p.m. according to Cameron.

With reference to Harris, Charlie Harris was in jail for the burglary among other things. Harris was upset with Cameron because he had gotten 10 years on a burglary charge and because Cameron sent his wife a bill for Cameron's services. He wrote Cameron and told him not to send his wife any bills. He was apparently upset on the length of sentence because a partner of his whom he implicated in the burglary was placed on probation for the same offense. Cameron explains the difference by stating that Harris pleaded guilty to this together with a number of other burglaries and apparently had more of a record than the other man.

I asked Cameron to keep this inquiry confidential and he stated he would. He did say, however, that he wanted to talk it over with his partner Allen Marcuvitz. I told him that I could merely recommend that he keep it confidential and could not order him to do so but that our division of the Bar would keep it confidential.

REC: ajo

* * *

[DECISION OF WISCONSIN SUPREME COURT—formal parts omitted.]

ORIGINAL ACTION commenced in this court upon the complaint of the Board of State Bar Commissioners, seeking the discipline of defendants, Alan David Eisenberg and Sydney M. Eisenberg, attorneys. *Adjudged, defendants' conduct merits discipline. Discipline imposed.*

The complaint of the Board of State Bar Commissioners alleged that defendants were guilty of unprofessional conduct. Issue was joined upon the complaint. Professor George H. Young was appointed referee to hear the testimony and make findings and recommendations in conformity with provisions of sec. 256.28, Stats. The findings and recommendations of the referee have been made and filed.

The referee found that the state had failed to prove the charges by clear and satisfactory evidence and recommended that:

(1) The complaint against the defendants be dismissed;

(2) Alan D. Eisenberg should be reprimanded by the court on the basis of his overall pattern of conduct as shown by the complete record.

The defendants have moved to dismiss the complaint; the state moved for judgment imposing discipline.

Additional facts will be referred to in the opinion.

PER CURIAM. The defendants, Sydney M. Eisenberg and his son, Alan David Eisenberg, are engaged in the practice of law as members of the same firm in the city of Milwaukee. The father is fifty-four years of age, the son is 29. Sydney M. Eisenberg was admitted to practice on June 12, 1939, and Alan Eisenberg on June 6, 1966.

The complaint in this proceeding alleges as follows:

Count I.

That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, were guilty of conduct which was unprofessional and such as would serve to bring the courts of justice of this state into disrepute and contempt and which was contrary to defendants' duty as licensed attorneys and to the attorney's oath which they took when they were admitted to practice and as set forth at sec. 256.29, Stats., and which oath provides in part as follows:

> "I do solemnly swear;
>
> ". . .
>
> "I will maintain the respect due to courts of justice and judicial officers;"

That defendants' conduct consisted of the following:

(a) That the defendants, Alan David Eisenberg and Sydney M. Eisenberg, both individually and by concerted action, pursued a course of vindictive and reckless harassment and psychological persecution against the Honorable JOHN E. KRUEGER, county judge of Milwaukee county, Wisconsin; that incident to said conduct, they caused to be publicly circulated statements which they knew, or should have known, would reach Judge Krueger to the effect that said judge was guilty of conduct for which a criminal warrant could be issued; that he would resign from the bench for personal reasons within 60 to 90 days or such warrant would be issued; and that said statements followed a series of advertisements in which defendants had participated, as alleged at Paragraph (b) hereof; that defendants' conduct was of such aggravated nature as to cause Judge Krueger great mental suffering and anguish, which culminated in his death by his own hand on August 28, 1968;

(b) That the defendants participated in causing the following advertisements to be run in The Milwaukee *Journal* and The Milwaukee *Sentinel* from April 20, 1968, through April 26, 1968, and again from April 29, 1968, through May 5, 1968:

> "ALL PERSONS with complaints against Judge John E. Krueger, write: Citizens' Committee for a more Dignified Traffic Court Judiciary, Greg Maxaculi, 728 Madison av., South Milwaukee, Wis. 53172."

And the following advertisement to be run in The Milwaukee *Sentinel* and The Milwaukee *Journal* from from May 14, 1968, through May 27, 1968, and in The Milwaukee *Journal* on June 11, 1968:

> "All complaints against Judge John E. Krueger write: Citizens' Committee, Greg Maxaculi, 728 Madison ave., South Milwaukee, Wis."

(c) That the course of conduct as alleged at Paragraph (a) hereof reached a point that Judge Krueger in desperation appealed to a friend for help; that the friend thereupon became an emissary to appeal to defendants that they desist from their activities; that said emissary was told by defendant, Sydney M. Eisenberg, that, "I spent a lot of money getting information on this man. We could chop him up, Ed, and we are going to do it;" that in the negotiations that followed the emissary was told by Sydney M. Eisenberg: 'He's [Judge Krueger] going to have to agree to what Alan and I decide;" and that in subsequent negotiations between defendants and said emissary a first draft of a press release was dictated by the defendant Sydney M. Eisenberg which became, after certain revisions, the press release as read by Judge Krueger.

(d) That in advance of the issuance and reading of the press release, defendant Alan David Eisenberg, did on Sunday night, August 25, 1968, and Monday morning, August 26, 1968, disseminate copies of the press release to several persons and boastfully read the same aloud in public and stated that if Judge Krueger did not read it Monday morning, he would be off the bench within 60 to 90 days and suggested to several persons that they be present in Judge Krueger's court to witness the issuance of the press release.

(e) That by the course of the conduct alleged at Paragraphs (a), (b), (c), and (d) Judge John E. Krueger was forced by defendants to humiliate himself and the court by issuing the press release on August 26, 1968, and reading the same in open court; that said press release and the ceremony at its issuance were designed to humiliate Judge Krueger, to aggrandize defendants Alan David Eisenberg and Sydney M. Eisenberg, and to demonstrate publicly defendants' successful subjugation of Judge Krueger.

Defendants filed lengthy answers to the complaint.

As to Count I, the answers allege that the complaint contains conclusions of law that do not require an answer but admit the taking of the attorney's oath prescribed by sec. 256.29, Stats.

With respect to the circulation of statements that Judge Krueger was guilty of conduct for which a criminal warrant could be issued, that he would resign within 60 to 90 days or that the warrant would be issued, and that such statements were accompanied with a series of newspaper advertisements soliciting complaints against Judge Krueger, the answer alleges that Sydney Eisenberg was not present at the time of the alleged statements but admits on information and belief that Alan Eisenberg did tell a newspaper reporter privately that he wouldn't be surprised if the Judge were off the bench in two or three months for reasons that anybody could see.

The answers further allege that the newspaper advertisements were run by one Gregorio Maxaculi after he had received legal advice from Alan Eisenberg and after approval by The Milwaukee *Journal* editorial board, based on legal advice.

With respect to the press release the answers allege that Attorney Edward Cameron participated in its preparation and that it was read by Judge Krueger of his own free will.

Otherwise the answers contain a general denial of the allegations of Count I, Paragraphs (a) to (e), inclusive.

The second defense of defendants' answers allege that the allegations with reference to harrassment of Judge Krueger and causing him great mental suffering, culminating in death by his own hand, are irrelevant to the complaint and that the trial of such matters would result in a deprivation of constitutional rights under art. I, secs. 1, 13 and 22 of the Wisconsin Constitution and of the Fourteenth amendment to the United States Constitution.

The third defense is that sec. 256.29, Stats., is vague and overbroad so as to violate rights under the First and Fourteenth amendments to the United States Constitution.

The fourth defense is that the complaint does not state facts sufficient to constitute a cause of action for discipline.

The fifth defense is that the requirement of sec. 256.29, Stats., for maintenance of respect due to courts of justice and judicial officers violates the right not to be punished by a bill of attainder and ex post facto law as provided in art. I, sec. 12, Wisconsin Constitution.

The sixth defense is that the conduct complained of in the complaint is speech activity protected by the First amendment of the United States Constitution.

The seventh defense is that the matters set forth in the complaint were made the subject of an extensive John Doe investigation in Milwaukee county and that the judge found that no offense had been committed against the laws of Wisconsin, so that to discipline the defendants on the basis of the allegations of the complaint would deny them due process of law and equal protection of the law under state and federal constitutions.

The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed.

In *State v. Preston* (1968), 38 Wis. 2d 582, 588c, 157 N. W. 2d 615, 159 N. W. 2d 684, this court stated:

> "A disciplinary proceeding is brought as an original action in this court, and the function of the referee is that of a special master appointed to conduct a hearing under the jurisdiction of this court. While the recommendations of the referee are given consideration, we look to the record and transcript to determine whether the facts apparent therein warrant some form of discipline. To evidence revealed in the record, we apply what this court has referred to (*Madison v. Geier* (1965), 27 Wis. 2d 687, 135 N. W. 2d 761) as the middle burden of proof."

The burden of proof is set forth in *State v. Treis* (1944), 245 Wis. 479, 489, 15 N. W. 2d 309, wherein we said:

> "While this is a civil action, triable without a jury, . . . Proof of the allegations must be by clear and satisfactory evidence, . . ."

The plaintiff relies upon the following facts in support of the complaint:

In May and June of 1968, the defendants caused the following advertisement to be run in The Milwaukee *Journal* and The Milwaukee *Sentinel*:

> "ALL PERSONS with complaints against Judge John E. Krueger, write: Citizens' Committee for a more Dignified Traffic Court Judiciary, Greg Maxaculi, 728 Madison av., South Milwaukee, Wis. 53712."

Reporter Ronald Haase testified that on August 22, 1968, he had a conversation with Alan Eisenberg in the press room of the Safety Building. They discussed the already well known enmity between Alan and the Judge, and Alan is alleged to have said:

> ". . . I predict within sixty to ninety days that Judge Krueger will resign from the bench for personal reasons or a felony warrant will be issued against him."

Alan is also alleged to have said:

> "We have got him good, we have got private detectives working on him. . . ."

Haase also testified that he told Judge Krueger that same day that Alan made the "felony warrant" statement.

The testimony disclosed that the following day Judge Krueger called his friend Edward Cameron to arrange a luncheon date. The Judge confided that he had had sexual relations with a woman attorney. He surmised that this must be what Alan Eisenberg was thinking of when he spoke of the felony warrant.

On Friday, August 23, 1968, Attorney Cameron, acting as an emissary for Judge Krueger, visited Sydney Eisenberg at his home in the hope of arranging a settlement of the dispute between the judge and the Eisenbergs.

On this occasion Cameron testified that shortly after he suggested that the matter was serious and that something should be resolved, Sydney stated: (1) "I spent lot of money getting information on this man. We could chop him up, Ed, and we are going to do it;" and (2) "I'll have to talk to Alan, and if he (Krueger) will agree to what Alan and I decide, then we will have peace. . . ."

Then Cameron and Sydney Eisenberg agreed to meet in Sydney's office the following morning.

The meeting took place in the Eisenbergs' office, and Sydney again, according to Cameron, said, "Look, Ed, I spent a lot of money. I've got drawers full of information about this guy, he's a bigot. We can ruin him."

On this occasion Cameron stated that he was authorized to speak for Judge Krueger and that the Judge wanted the dispute ended. Whereupon, according to Cameron, Sydney replied, "All right, we can resolve it, end it, but he has got to give a press release that Alan and I tell him to give."

Sydney then dictated a press release to a stenographer, speaking in the first person as though he (Sydney) were Krueger. As Cameron was about to leave the office, he said to Sydney, "What assurance can I give Krueger that the fight is over? Will this (the reading of the release) end it?"

Cameron states that Sydney then said the reading of the release would end the dispute but that:

> "I'm [Sydney] not going to destroy the evidence I have gathered against Krueger because he could declare war again two weeks after he reads it. . . . The only thing you got to worry about is to get the broad and tell her to keep her mouth shut and everything will be all right. . . ."

Cameron, Krueger and Kuzmic, the judge's bailiff, all met in Cameron's office about 1 p. m., in the afternoon of Sunday, August 25, to discuss the proposed press release. At this conference three changes were made in the press release. Attorney Cameron was substituted for Miriam Eisenberg on the proposed three-man advisory committee. A passage indicating that Judge Krueger would not run for reelection at the end of his present term was deleted, and a reference to the Eisenberg law firm as being "nationally and internationally famous" was deleted.

Later on this same Sunday afternoon, August 25, Cameron and Judge Krueger went to Sydney's home to inform him of these changes. The meeting was cordial. There was no objection to the changes, and Cameron and the Judge left the Eisenberg home.

Later that evening, Alan appeared in the Belmont Hotel Coffee Shop and approached a group of people at one of the tables. Included in the group were the late State Senator Norman Sussman and his wife Rose, Mrs. Alice Boettcher, Mr. and Mrs. Ben Siegel; and, according to Mrs. Boettcher, a Mr. Lew Sangor was also present.

According to the testimony of Mrs. Boettcher, Alan arrived at the table carrying copies of the press release on his arm and stated, "I finally did it—I finally made it. I have got him over a barrel." Someone in response asked, "Who?" And Alan replied, "Judge Krueger." Alan then handed Senator Sussman a copy of the release and asked him to read it slowly. The Senator refused, so Alan read the release to the group. Senator Sussman expressed doubt that Judge Krueger would ever sign such a release. In response to this, by Mrs. Boettcher's account, Alan said that it would make no difference—he would still have him off the bench in 60 days because "he said that they had enough evidence on recalls." Mrs. Boettcher also testified that Alan made a statement that next he would get Judge Moser.

According to Newspaper Reporter Wiliam Hale, about 10 a. m., Monday morning, after Judge Krueger's bailiff had summoned reporters from the press room, the Judge read the press release in his chambers. Shortly prior to this time, Alan was standing in the hall in front of Judge Krueger's court handing out copies of the release. William Hale also testified that Attorney Orville Pitts told him that as he (Pitts) was walking down the hall, Alan came up to him and said (referring to the impending reading of the release):

> " '. . . Come on, Orville, . . . I want you to watch Judge Krueger make an ass out of himself.' . . ."

The making of this statement was corroborated by Attorney Pitts.

Later Judge Krueger read the release in chambers and then from the bench.

Sentinel Reporter William Janz that same day visited Judge Krueger and asked the Judge why he appointed the Eisenbergs to the committee. Judge Krueger first replied that he could not talk about it, but, when pressed for an answer, Judge Krueger broke down and began to cry. He stated, according to Janz, that the Eisenbergs had evidence against him and that Alan had been pressuring and harrassing him. Later that day Janz suggested that they go directly to The Milwaukee *Sentinel* offices and discuss the matter with his editor. They then proceeded to the office of Harvey Schwandner, editor of The *Sentinel.*

At this meeting the judge confided that he had had sexual relations with a woman attorney and that he (Krueger) believed that the Eisenbergs knew about it. Schwander assured the Judge that for the time being The *Sentinel* would print nothing about the affair.

On Tuesday, August 27, 1968, the morning *Sentinel* carried a story which stated Judge Krueger told the newspaper that the Eisenbergs had pressured and harrassed him into giving the press release of the previous day, which release created the court advisory committee.

Joseph Pecor, a Milwaukee *Sentinel* reporter, testified that in a telephone conversation with Alan, the following statement was made by Alan, "I have something on him. Someday over a few beers I'll tell you how I got him to do this."

William Jennaro, an assistant district attorney, testified that immediately before the press release was read by Judge Krueger, Alan said to him, "Listen to this, I've got him."

Attorney Orville Pitts testified that on August 26, 1968, the day Judge Krueger read the press release, that Alan Eisenberg saw him in the Safety Building and said, "Come on, Orville, I want you to go somewhere with me," to which he replied, "Where?" and Alan said, "I'm going to Judge Krueger. I want you to see something. I want you to watch Judge Krueger make an ass out of himself."

The defendants' version of the factual situation is in sharp conflict with that of the state.

In regard to the conversation between Alan and Reporter Haase in the Safety Building on Tuesday, August 22, 1968, Alan denies that he said a felony warrant would soon be issued against Judge Krueger. He also denies that he said that he had private detectives working on the Judge. What he told Haase, he says, is that a sitting judge could only be removed under three circumstances: recall, impeachment or being found guilty of a crime and resultant disbarment.

At the meeting on Sunday, August 25, 1968, at the Eisenberg home, Alan states that he said to Judge Krueger, "If you want to make changes or reforms in your court, why don't you just go ahead and do it? What do we need a press release or a committee for?"

Alan admits he showed the release to Senator Sussman because he was proud of the accomplishment it represented. He denies that he made the other remarks attributed to him by Mrs. Boettcher.

The next incident was the reading of the press release on Monday, August 26, 1968. Here Alan admits that he invited Attorney Pitts to see the ceremony in Judge Krueger's court. Again he did so because he was proud of the reforms. Alan denies that he said to Pitts, "Come on and watch Krueger make an ass out of himself."

A defense witness, June Fell, a former Eisenberg secretary, testified that she was in Sydney's office when Sydney and Cameron discussed the release problem and that it was her impression that the press release was Cameron's idea, but that Sydney and Cameron composed it jointly and that Alan did not participate in the conference.

During these proceedings Alan Eisenberg gave testimony which directly conflicts with the testimony of 13 witnesses. The record shows that as to any testimony which supported the allegations of the complaint, Alan refutes the same by labeling it to be false.

Portions of some of the testimony of state witnesses were corroborated by other witnesses.

The defense tried to show that Attorney Cameron, the state's principal witness, was a person of questionable character and involved in criminal activities. To this end they produced a witness, one Clarence Harris, a former client of Cameron's and an oft-convicted burglar who at the time of the hearing was an inmate at the state prison.

The state, in response to Clarence Harris' testimony, called his brother, Lawrence Harris, who testified that Clarence's reputation for truth and veracity was very poor and that, in his opinion, Clarence was not above perjuring himself.

The defense produced additional testimony by like characters disparaging Attorney Cameron's general reputation.

This entire interlude in the hearing could be discarded if it were not for the fact that the referee concluded that on the basis of this testimony he had serious doubts about Cameron's truthfulness.

The state tried to rehabilitate Cameron's reputation by calling prominent Milwaukee judges and lawyers to testify that he enjoyed a good reputation for honesty. The referee excluded this testimony, and the state claims this was error.

We think the Harris testimony about Cameron should not have been allowed because it did not go directly to his reputation for the particular character traits supposedly being impeached, i.e., integrity and veracity. This testimony went instead to Cameron's general character.

Speaking on the topic of impeaching credibility, McCormick says:

> ". . . Surely it is clear that in this elusive realm of opinion as to reputation as to character it is best to reach for the highest degree of relevancy that is attainable. Fortunately the great majority of our courts have taken this view and limit the inquiry to 'reputation for truth and veracity.' Only a few open the door, in addition, to reputation for 'general character' or 'general moral character' and fewer still permit proof of reputation for specific traits other than veracity." McCormick, *Evidence* (Hornbook Series) (1954), p. 95, sec. 44. *See also*: 3 Wigmore, *Evidence* (3d ed.), p. 450, sec. 923.

However, once the error occurred and the testimony was let in, there can be no question but that Cameron's general character, and, by implication, his reputation for truth and veracity, had become an issue. Under these circumstances, the state was entitled to enter contrary evidence both as to his general character and as to the specific traits of truthfulness and veracity. *State v. Baker* (1962), 16 Wis. 2d 364, 114 N. W. 2d 426; 4 Jones, *Evidence, Civil and Criminal,* (5th ed.), p. 1629, sec. 867; 98 C. J. S., *Witnesses,* p. 464, sec. 532.

In weighing the evidence we must consider the interest which the defendants had in the outcome of this case against the interest of those who testified in behalf of the plaintiff.

It is a well-established legal principle:

> ". . . The test of interest is to be applied to all witnesses, and, while the circumstances may vary, the test remains the same, and where witnesses of appar-

ently equal credibility disagree, circumstances tending to indicate which version of the transaction is reliable will be carefully considered." 98 C. J. S., *Witnesses,* pp. 475, 476, sec. 538.

The referee found that Alan Eisenberg made the statements attributed to him by Mrs. Boettcher and Mrs. Sussman.

After a careful review of the record and transcript made in these proceedings, we find:

(1) That Alan Eisenberg publicly charged Judge Krueger with conduct (unspecified) for which a criminal warrant could issue;

(2) That Alan Eisenberg predicted the Judge would resign for "personal reasons" within a short period rather than face prosecution;

(3) That Alan Eisenberg arranged for and Sydney signed checks in payment of newspaper advertisments soliciting complaints against Judge Krueger;

(4) That in concert the defendants pressured the Judge unwillingly to appoint them to an advisory committee concerning the administration of his court;

(5) That in concert the defendants forced the Judge to publicly read a press release announcing their appointment for the purpose of aggrandizing themselves and demonstrating their subjugation of and their dominance over the Judge; and

(6) We find that the above acts of the defendants constitute unprofessional conduct tending to bring the courts into disrepute and contempt and that such conduct

is contrary to the duties of the defendants as licensed attorneys and in violation of their oaths as attorneys, taken pursuant to sec. 256.29, Stats.

The second defense of defendants' answers alleged in substance that the effects of the alleged conduct are irrelevant and that the trial of such matters would result in a deprivation of constitutional rights.

We agree that the allegations of the complaint with reference to great mental suffering of Judge Krueger, culminating in death by his own hand, are irrelevant. In this proceeding we are primarily concerned with the conduct of the defendants.

It is the duty of the defendants to maintain toward all courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its dignity.

The defendants' third defense—that sec. 256.29, Stats., is vague and over-broad so as to violate rights under the First and Fourteenth amendments to the United States Constitution—is without merit and cannot be sustained.

This court in *In re. Cannon* (1932), 206 Wis. 374, 240 N. W. 441, placed an interpretation on sec. 256.29, Stats., which limited its potential scope and application in a manner clearly consistent with the mandates of the United States Constitution.

The fourth defense is in effect a demurrer to the sufficiency of the complaint.

On December 4, 1968, this court entered an order overruling the demurrer with prejudice. We think that ruling was and is proper since the complaint does not stop with charging the making of statements. It charges a course of conduct which is alleged to be unprofessional.

The fifth defense alleging that the requirement of sec. 256.29, Stats. for maintenance of respect due to courts of justice and judicial officers violates the right not to be punished by a bill of attainder and ex post facto law as provided in art. I, sec. 12, Wisconsin Constitution, is in our opinion without merit.

License to practice law in the state is granted on implied understanding that an attorney shall at all times demean himself in proper manner and refrain from such practices which bring disrepute upon himself, the profession and the courts. This implied understanding is also affirmed by the oath taken by the attorney on admission to practice.

The sixth defense alleging that the conduct complained of in the complaint is speech activity protected by the First amendment of the United States Constitution is repetitious of the fourth defense and is also without merit.

Although speech activity is involved, it is intermingled with a course of conduct which is alleged to be unprofessional. The fact that speech is intermingled with conduct does not endow the conduct with constitutional protection where the state can properly regulate the conduct as a whole. *Cameron v. Johnson* (1968), 390 U. S. 611, 617, 88 Sup. Ct. 1335, 20 L. Ed. 2d 182.

The solicitation of complaints against a judge by newspaper advertisements is in itself a weapon of awesome intimidation, especially where, as here, the defendants clearly intended the results to intimidate the Judge. The defendants did not request any advertisements that replies be referred to the proper authorities. On the contrary, the record indicates the defendants were obtaining and keeping any information acquired for their own use against the Judge.

Canon 1 of the Canons of Professional Ethics of the American Bar Association, which canons were adopted in Rule 9 of the Rules for the Integration of the Bar by the Wisconsin Supreme Court, 273 Wis. xx (1956), provides in part:

> "Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. . . ."

We think the solicitation of complaints through newspaper advertisement constituted, under the circumstances, a part of a program of intimidation of a judge and thus went beyond the attorney's right of free speech.

The defendants' last defense contends that the matters set forth in the complaint were made the subject of an extensive John Doe investigation and that the judge found that no offense had been committed against the laws of Wisconsin, so that to discipline the defendants would deny defendants due process of law under state and federal constitutions.

We find no merit to this contention. The purpose of a John Doe proceeding, pursuant to sec. 954.025, Stats., is to ascertain whether a crime has been committed and by whom committed; while a disciplinary proceeding is a civil action under sec. 256.28(12), Stats.

We conclude that the evidence clearly and satisfactorily establishes that both defendants are guilty of irresponsible and unprofessional conduct. The conclusion warrants suspension of the defendants' licenses.

Therefore, it is ordered and adjudged that the license of defendant Sydney M. Eisenberg be and is hereby suspended until reinstatement; defendant may apply for reinstatement of his license after the expiration of one year and upon compliance with sec. 6, Rule 10, State Bar Rules. One-half of the cost of these proceedings, which costs aggregate $20,559.79, shall be taxed and charged to the defendant, payable within twelve months.

It is further ordered and adjudged that the license of defendant Alan David Eisenberg be and is hereby suspended until reinstatement; defendant may apply for reinstatement of his license after the expiration of one year and upon compliance with sec. 6, Rule 10, State Bar Rules. One-half of the cost of these proceedings, which costs aggregate $20,559.79, shall be taxed and charged to the defendant, payable within twelve months.

It is further ordered that the State Bar of Wisconsin notify the courts of record of these orders by sending each copies thereof.

It is further ordered that Sydney M. Eisenberg and Alan David Eisenberg notify their respective clients now represented by them in all matters involving the practice of law or all matters pending in any court of this state that their respective licenses to practice law in this state are now suspended.

* * *

[MOTION FOR STAY—formal parts omitted.]

TO THE HONORABLE, THE SUPREME COURT:

COME NOW the defendants Alan David Eisenberg and Sydney M. Eisenberg, defendants in the above entitled matter, and move the court for its order staying the suspension of defendants' licenses and in support thereof show to the Court as follows:

1. On November 3, 1970, this Court entered its opinion and order suspending the licenses of the defendants Alan David Eisenberg and Sydney M. Eisenberg:

2. Defendants will move this Court for rehearing of its opinion and order suspending their licenses.

WHEREFORE defendants request a stay of the suspension of their licenses pending a determination by the Court of a Motion for rehearing.

Respectfully submitted:

/s/ Sydney M. Eisenberg
Sydney M. Eisenberg

/s/ Alan D. Eisenberg
Alan David Eisenberg

Dated this 4th day of November, 1970.

/s/ Lawton & Cates
LAWTON & CATES,

RICHARD L. CATES
and JOHN H. BOWERS

Attorneys for Defendants

* * *

[ORDER.]

Madison, November 4, 1970

To Attorney Richard L. Cates
Lawton & Cates, Madison

Attorney Rudolph P. Regez
Regez, Johnson & Callahan, Monroe

Sir:—The Court today announced decision in your case as follows:

ORDERED that the defendants' petition for a stay of the suspension of their license pending a determination by the Court of a motion for rehearing be and the same is hereby denied.
159 Y 3

Respectfully yours,

Franklin W. Clarke
Clerk of Supreme Court

* * *

MOTION FOR REHEARING [—formal parts omitted.]

PLEASE TAKE NOTICE THAT the defendants above named, hereby move the court for rehearing from the decision of the Court made and entered November 3, 1970, in the above entitled cause.

Respectfully submitted,

LAWTON & CATES

/s/ RICHARD L. CATES
Richard L. Cates

/s/ JOHN H. BOWERS
John H. Bowers

* * *

MOTION FOR STAY OF MANDATE PENDING DETERMINATION OF MOTION FOR REHEARING [—formal parts omitted.]

NOW COME Alan David Eisenberg and Sydney M. Eisenberg, defendants above-named, by their attorneys Lawton & Cates, and move the court for a stay of its mandate entered on November 3, 1970, pending the court's determination of the motion for rehearing filed with the court by defendants on November 4, 1970.

The reasons why a stay is deemed necessary are as follows:

> (1) The aforesaid motion for rehearing concerns the vindication of important individual rights secured to defendants under the Constitution of Wisconsin and of the United States.
>
> (2) The judgment and mandate of the court imposes a substantial burden on and will cause grievous injury to defendants, in that it denies them the right to practice their profession, in which they are trained and on which they depend for their livelihood and that of their families, for a period of not less than one year, and in that it requires of them that within said one-year period which they may not practice their profession they must pay the costs of the proceeding against them, which costs aggregate $20,559.79, and of which injury will be irreparable and for which injury defendants will have no remedy.
>
> (3) It is the good faith belief of defendants and their attorneys that the judgment of the court entered on November 3, 1970, ought to be reviewed and modified.

"(4) That in concert the defendants pressured the Judge unwillingly to appoint them to an advisory committee concerning the administration of his court;

"(5) That in concert the defendants forced the Judge to publicly read a press release announcing their appointment for the purpose of aggrandizing themselves and demonstrating their subjugation of and their dominance over the judge; and

"(6) We find that the above acts of the defendants constitute unprofessional conduct tending to bring the courts into disrepute and contempt and that such conduct is contrary to the duties of the defendants as licensed attorneys and in violation of their oaths as attorneys, taken pursuant to sec. 256.29, Stats." *State v. Eisenberg,* 48 Wis. (2d) at 379, 180 N.W. (2d) 529.

In making these findings the Court recited the evidence relied on by the State, including the testimony of witnesses the trial referee had found to be not reliable. No mention was made of the evidence relied on by the defense. No mention was made of the Bressette affidavit—wherein Bressette confessed he had perjured himself, at Cameron's request, when he testified for the State before the trial referee; and no mention was made of the defense motion pending before the Court to remand the case for further evidenciary hearings regarding the Lawent affidavit—wherein were set forth facts which the State itself had said, if true, rendered its charge that the Eisenbergs forced Krueger to do their bidding to be "without merit". The Court did, however, say the allegation that the Eisenbergs had caused Judge Krueger's death was irrelevant. *State v. Eisenberg,* 48 Wis. (2d) at 380, 180 N.W. (2d) 529.

The only reference made by the Wisconsin Court to *In re Cannon,* 206 Wis. 374, 240 N.W. 441, was to declare the defense contention, that the standards applied against the Eisenbergs were unconstitutionally vague and overbroad, to be without merit, on the ground that that decision had limited the scope of their application in a manner consistent with constitutional requirements. *State v. Eisenberg,* 48 Wis. (2d) at 380, 180 N.W. (2d) 529. The Court did not further discuss the said contention or that decision, nor analyze that decision's application to this case. The Wisconsin Court made no reference whatsoever to the decision of the United States District Court in *Eisenberg v. Boardman,* 302 F. Supp. 1360.

By the judgment of the Wisconsin Supreme Court the licenses of Sydney and Alan Eisenberg to practice their profession in Wisconsin were suspended until such time as they should be reinstated by the Court, with permission being granted for them to apply for reinstatement after one year. Each Eisenberg was ordered to pay one half of the costs of the proceedings against them, which costs aggregate $20,559.79. *State v. Eisenberg,* 48 Wis. (2d) at 382, 180 N.W. (2d) 529.

On November 4, 1970, counsel for the Eisenbergs filed a motion with the Wisconsin Court, wherein they stated their intention to move the Court for a rehearing, and requested the Court stay the execution and enforcement of its judgment pending determination of the rehearing motion which was to be filed. (App. 224.) This motion was summarily denied on the morning it was filed. (App. 225.)

On November 4, 1970, at 4:30 p.m., the defense filed a timely motion for rehearing with the Wisconsin Court. (App. 226.) At the same time it filed a second motion for a stay of the Court's judgment, pending its determination of the rehearing motion. (App. 227.) By order dated November 13, 1970, this second motion for a stay was denied by the Wisconsin Court. (App. 228.)

In support of the motion for rehearing the defense filed a brief in which it once more set forth the critical constitutional issues raised in this case. In response to this brief the State filed a brief opposing the motion for rehearing. In its brief the State for the first time before the Wisconsin Court, addressed itself to *In re Cannon,* 206 Wis. 374, 240 N.W. 441, and cited that decision as supporting the State's theory of its case against the Eisenbergs as follows:

> "The conclusion is inescapable that if the court found that Mr. Cannon had (as in the instant case) publicly charged a sitting judge with conduct for which a criminal warrant could issue, or that he had predicted the judge would resign for personal reasons rather than face prosecution, or had solicited complaints against a judge by newspaper advertisements, such conduct would have been considered unprofessional and of such a character as to preclude readmission to the Bar." Plaintiff's Brief in Opposition to Defendants' Motion for Rehearing at 3.

By order dated January 5, 1971, the rehearing motion was denied by the Wisconsin Court without opinion or explanation, but with costs of the motion imposed on the defense. (App. 231.) The State's prosecution of this case was thereby concluded.

On January 14, 1971, the defense filed with the Wisconsin Supreme Court a motion for a stay of the execution and enforcement of the Court's judgment pending application to the Supreme Court of the United States for writ of certiorari. (App. 232.)

By order dated January 19, 1971, this motion was denied, without opinion. (App. 235.) Thereafter a petition dated January 29, 1971, for a stay of the Wisconsin Court's judgment against the Eisenbergs, pending application for and review on certiorari, was filed with this Court. On February 10, 1971, the said petition was granted by Honorable Thurgood Marshall, Associate Justice of this Court.

REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION.

Persons who are licensed attorneys have the same constitutionally secured rights as all other persons under our system of government. *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967). Among these are the rights not to be excluded by the State from the practice of their profession for reasons, or in a manner, that contravene the constitution of the United States. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957).

By reason of the final judgment of the Wisconsin Supreme Court in this case, and the standards applied and procedures followed by the State of Wisconsin in this case, Sydney and Alan Eisenberg, a father and son, licensed attorneys in Wisconsin, have been denied substantive and procedural rights secured to them under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. By the Wisconsin Court's judgment they have been excluded from the practice of their profession for a period of one year and until readmitted to that practice by the Wisconsin Court.

This case involves fundamental questions concerning the rights of individuals under our system of government. At stake are the rights of a class of persons under our system freely to comment regarding elected public officials, and to be accorded procedural due process when brought into contest with government for having thus commented. At stake is the freedom of every licensed attorney to speak out critically concerning the courts and judicial officers before whom he may practice, regarding matters not involving pending litigation in which he is engaged, without fear of punishment being imposed by way of suspension of his license to practice his profession and the imposition of the penalty of paying the costs —herein in excess of $20,000, of the prosecution, and without fear of having to face such contest with government without being accorded fair opportunity to defend himself.

These rights are important not only to attorneys, but also to the required recognition of rights and freedoms secured to all individuals against their government under our system, and to a fair administration of justice:

> "No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a courthouse, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges who he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system." *Ex parte Steinman,* 95 Pa. 220, 238-239,

40 Am. R. 637 (1880); see *In Re Cannon,* 206 Wis. 374, 406-408, 240 N.W. 441 (1932).

Such considerations are of special significance where, as in Wisconsin, judges are chosen by popular ballot.

It is recognized that this case presents a challenge to important prerogatives of the Wisconsin Supreme Court, involving regulation of the attorneys who practice in the courts of Wisconsin, and that the Wisconsin Court's power in this area has even been characterized, by the State, as "plenary" in dimension. But even such prerogatives and such power do not permit invasions of the most fundamental rights secured to individuals under the United States Constitution. Under our system of government, review by this Court of the powers of the Wisconsin Supreme Court to regulate attorneys stands on no different footing than such review of the power of a legislature, or an executive, to regulate individuals, when the questions presented for review involve the Constitution of the United States. See, e.g., *Spevack v. Klein,* 385 U.S. 511 (1967).

I. THE SUBSTANTIVE RIGHTS OF SYDNEY AND ALAN EISENBERG, SECURED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, FREELY TO COMMENT AND TO EXPRESS THEIR OPINIONS CONCERNING GOVERNMENT AND GOVERNMENT OFFICIALS, HAVE BEEN DENIED BY THE JUDGMENT OF THE WISCONSIN SUPREME COURT.

The Judgment of the Wisconsin Supreme Court against Sydney and Alan Eisenberg is based on six findings:

> "(1) That Alan Eisenberg publicly charged Judge Krueger with conduct (unspecified) for which a criminal warrant could issue;
>
> "(2) That Alan Eisenberg predicted the Judge would resign for 'personal reasons' within a short period rather than face prosecution;
>
> "(3) That Alan Eisenberg arranged for and Sydney signed checks in payment of newspaper advertisements soliciting complaints against Judge Krueger;
>
> "(4) That in concert the defendants pressured the Judge unwillingly to appoint them to an advisory committee concerning the administration of his court;
>
> "(5) That in concert the defendants forced the Judge to publicly read a press release announcing their appointment for the purpose of aggrandizing themselves and demonstrating their subjugation of and their dominance over the judge; and
>
> "(6) We find that the above acts of the defendants constitute unprofessional conduct tending to bring the courts into disrepute and contempt and that such conduct is contrary to the duties of the defendants as licensed attorneys and in violation of their oaths as attorneys, taken pursuant to sec. 256.29, Stats." *State v. Eisenberg,* 48 Wis. (2d) 364, 379, 180 N.W. (2d) 529 (1970).

These six findings are stated as a logical progression, the findings numbered 1 through 5 building up to the ultimate conclusion or finding, that numbered 6. They are bottomed on and each concerns speech activity regarding Judge Krueger, allegedly engaged in by Sydney and Alan Eisenberg. The judgment based on these findings punishes the Eisenbergs for their exercise of rights and freedoms secured under the First and Fourteenth Amendments to the United States Constitution.

The findings numbered 1 and 2 clearly concern speech that falls within the protective vale of the First Amendment. The "central meaning" of that Amendment is that under our system of government an individual's comment regarding government or government officials, including judges, albeit made in sharp terms, may not serve as a reason for the imposition of criminal or civil penalties against him, absent a showing that such comment was false and was made with knowledge it was false or with reckless disregard of whether it was true or false. *Pickering v. Board of Education,* 391 U.S. 563, 574, (1968); *Garrison v. Louisiana,* 379 U.S. 64, 72-75 (1964); *New York Times Co. v. Sullivan,* 376 U.S. 254, 270-272, 279-280, 282 (1964); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment",* 1964 SUP. CT. REV. 191, 204-209. With respect to punishment of an individual for contempt, for comment critical of judicial officers, where particular concern exists for the dignity and reputation of the courts, the rule is that "such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice". *New York Times Co. v. Sullivan,* 376 U.S. at 272-273; *Wood v. Georgia,* 370 U.S. 375, 384-385 (1962); *Craig v. Harney,* 331 U.S. 367, 376 (1947). See also *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968).

The right to comment freely regarding government officials, including judges, is secured to all persons under our system, including licensed attorneys such as Sydney and Alan Eisenberg. See, e.g., *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967); *Garrison v. Louisiana,* 379 U.S. 64. In this case there has never been any allegation, there has been no finding, and, indeed, there is no evidence, that the comments referred to in the findings numbered 1 and 2 were false or made with reckless disregard of whether they were true or false. Also wanting is any allegation, finding or evidence that the said comments posed any danger to the administration of justice. The trial referee, who heard and saw the witnesses, found the State had failed to prove that the comment referred to in the finding numbered 1 had, in fact, even been made. (App. 128.)

With regard to the Court's finding numbered 2, the referee found that while Alan Eisenberg had said he would have Krueger off the bench soon, during an informal conversation in a restaurant, such a comment was the result of "thoughtlessness and bad judgment, and not a deliberate attempt to convey the impression that he held the whip hand over Judge Krueger"; and in all events that this comment was never passed on to Krueger. (App. 130.) The trial referee, however, made no finding that Alan Eisenberg had said a felony warrant would issue or prosecution result if Krueger did not resign.

The finding numbered 3 also involves constitutionally protected speech activity. Paid newspaper advertisements, published for the purpose of seeking support for a movement of public interest and concern, are protected under the First Amendment. *New York Times Co. v. Sullivan,* 376 U.S. at 265-266. This is particularly true when such ads concern an elected government official, as is the case here. And there is no allegation, finding or evidence, that the newspaper ads here posed any danger whatsoever to the administration of justice. The trial referee found, with respect to these advertisements, as follows:

> "The third section of the State's brief is directed to the publication of ads in the Milwaukee Journal requesting that anyone with a complaint against Judge Krueger should report it to Mr.

Maxaculi, a friend of the Eisenbergs. The ad ran from the Spring of 1968 until August of that year when the Judge committed suicide. Apparently, Alan worded the ad and placed it initially. There is no evidence that Sydney was involved other than in signing the firm or business checks for payment for the ads. When the ads were first published, Alan and others were interested in attempting to recall Judge Krueger. A petition seeking his recall had been printed. There is no evidence that these ads caused any serious mental or emotional disturbance to Judge Krueger. On the contrary, the testimony was that he was not concerned about complaints as to the conduct of his court, no matter how many, and he would welcome any fight on that issue.

"There remains the possibility of whether the mere placing of the ads was unprofessional conduct. If the evidence showed that these ads were published in bad faith and without foundation, for no purpose other than to embarrass and discredit a sitting judge, I would find that such action warranted censure and discipline. But, there is no such evidence. On the contrary, there is substantial evidence that Judge Krueger's conduct on the bench was such as to cause legitimate concern as to his fitness and competence for the office on the part of those practicing before him or even merely present in his court. There was also uncontroverted evidence that Alan had expressed his concern over Judge Krueger's conduct to appropriate officials on more than one occasion and had been advised that a recall procedure was one way of attempting the removal of a judge. Obviously, if a petition for recall based on legitmate complaints was intended to be circulated, potential signers would need to be solicited. Accordingly, I find that causing the publication of the ads was not in itself meretricious or unprofessional conduct." (App. 131-132.)

The findings numbered 4 and 5 depend on and are stated as the logical extension of the findings numbered 1 through 3. These two findings state the view held by the Wisconsin Supreme Court as to the effect on Judge Krueger worked by the speech activity of Sydney and Alan Eisenberg referred to in the three preceding findings. Assuming that the speech activity referred to in those findings did impell Judge Krueger to make the indicated public announcements, this would not strip the mantel of constitutional protection from that activity. Criticism of government officials does not lose its constitutional protection merely because it moves a government official to action. See *New York Times Co. v. Sullivan,* 376 U.S. at 273. Were it otherwise the First Amendment would serve no purpose; its underlying rationale—that under our system change is to be accomplished not by force and violence but by public comment and government officials' reaction, either freely or grudgingly, to public opinion—would be without substance. Further, if speech activity were to lose its constitutional protection whenever government officials acted grudgingly in response to it, the parameters of this most basic right would be fixed by those officials most timid and "sensitive to the winds of public opinion", or by those who for reasons known only to themselves believe they are particularly vulnerable. See, e.g., *Craig v. Harney,* 331 U.S. at 376. But government officials, including judges, are "supposed to be men of fortitude, able to thrive in a hardy climate". *New York Times Co. v. Sullivan,* 376 U.S. at 273; *Craig v. Harney,* 331 U.S. at 376.

In all events, it was the finding and conclusion of the trial referee that but for the mental illness of Judge Krueger, and his concern over a real or imagined affair with a female attorney—of which the Eisenbergs had no knowledge, and but for the conduct of newspaper reporters in pursuit of a story, Judge Krueger would have paid scant heed to anything the Eisenbergs might have been reported to have said. (App. 148-149.) Indeed, after taking the actions said to have been forced on him by Sydney and Alan Eisenberg, and referred to in the findings numbered 4 and 5, Judge Krueger turned around and publicly repudiated those actions on the very next day, and refused thereafter to speak with the Eisenbergs. (Tr. 2262.) This is hardly evidence that they were forcing the Judge to act to their wishes.

Also important in this connection are the findings made by the referee when, during the trial, the State rested its case against the Eisenbergs. The trial referee found there was no causal relationship established between any word or conduct of either Eisenberg and Judge Krueger's mental illness and suicide. He also found that neither Sydney nor Alan Eisenberg had committed any act of extortion. (App. 101-102.) Upon conclusion of the trial the referee, after setting forth a detailed factual analysis of the evidence, again found the Eisenbergs had neither caused Judge Krueger's mental illness or suicide, nor forced him to make the public announcements in question. (App. 153.) The Wisconsin Supreme Court does not reject these factual findings of the referee. The Court makes no finding that either Sydney or Alan Eisenberg was guilty of any act of extortion; the Court makes no finding—and there is no evidence, that either Eisenberg made to or in any way communicated to the Judge a threat to accuse him of any crime or misdeed for the purpose of compelling him to act in a certain manner, or that they made any extortionate demand upon Judge Krueger. In its opinion the Wisconsin Court only states the conclusion that Sydney and Alan Eisenberg "forced" and "pressured" Judge Krueger unwillingly to appoint them to a committee and to make a public announcement. The only factual findings it makes as to what it was they did which may have led the Judge to take this action all consist of protected speech activity. That

Judge Krueger, for whatever his reasons, may have reacted to speech activity engaged in by the Eisenbergs cannot remove the mantel of constitutional protection from that speech.

Finally, in its opinion the Wisconsin Supreme Court characterizes the Eisenbergs' speech activity as a "course of conduct" and "unprofessional". *State v. Eisenberg,* 48 Wis. (2d) at 381, 180 N.W. (2d) 529. The effect of such a characterization is to equate any critical comment made on more than one occasion with "conduct", and to substitute labels for the required constitutional analysis. But comment regarding government officials, absent something more—and there is nothing more established in this case, cannot be labeled as conduct merely because it is repeated. Like "various other formulae for the repression of expression", a "course of conduct" that consists solely of speech activity, and the label "unprofessional", "can claim no talismanic immunity from constitutional limitations". *New York Times Co. v. Sullivan,* 376 U.S. at 269. "The state cannot foreclose the exercise of constitutional rights by mere labels." *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 6 (1964); *NAACP v. Button,* 371 U.S. 415, 429 (1963); see *Giaccio v. Pennsylvania,* 382 U.S. 399, 402 (1966).

The finding numbered 6 is the factual conclusion based on the preceding five findings. As is the case with those findings, it too is inextricably concerned with protected speech activity. The judgment of the Wisconsin Supreme Court, which rests on these findings, impermissibly punishes Sydney and Alan Eisenberg for the exercise of rights secured under the First Amendment to the United States Constitution. In this case, as has been observed on another occasion, "the Supreme Court of Wisconsin refrained from practicing the method of constitutional analysis which . . .

is demanded by" the decisions of the Supreme Court of the United States. *Zwicker v. Boll,* 270 F. Supp. 131, 144 (W.D. Wis. 1967) (Doyle, J., dissenting).

II. THE SUBSTANTIVE RIGHTS OF SYDNEY AND ALAN EISENBERG AND OF ALL LICENSED ATTORNEYS IN THE STATE OF WISCONSIN, SECURED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, TO BE FREE FROM THE "CHILLING" EFFECT WORKED BY THE EXISTENCE AND THE APPLICATION OF VAGUE AND OVERBROAD STANDARDS OF CONDUCT IN THE SPEECH AREA, HAVE BEEN DENIED IN THIS CASE.

In this case the State of Wisconsin charged Sydney and Alan Eisenberg with conduct labeled "unprofessional", on the grounds they had violated a statutory oath—sec. 256.29(1), Wis. Stat., that required them to maintain "respect" toward courts and judges. In support of these allegations the complaint against them alleged that the Eisenbergs had engaged in various "conduct", all of which consisted of or was based on speech activity.

On November 12, 1968, before the trial before the referee began, the defense filed with the Wisconsin Supreme Court a motion to strike from the complaint various allegations of "conduct" on their part, on the grounds the alleged conduct consisted only of constitutionally protected speech activity. At this same time, the defense demurred to the complaint and moved that the action against the Eisenbergs be dismissed. (App. 15, 18.) In support of this motion the defense filed with the Court affidavits (App. 19), and a statement of authorities. In its statement of authorities the defense based its demurrer and motion to dismiss on *In re Cannon,* 206 Wis. 374, 240 N.W. 441 (1932), wherein the Wisconsin Court had held that speech activity may not serve as basis for a charge of "disrespect" under the statutory oath. By order dated December 4, 1968, the Wisconsin Court denied the motion to strike, demurrer and motion to dismiss, without opinion, and ordered the Eisenbergs to answer to the complaint. (App. 27.)

On December 13, 1968, Sydney and Alan Eisenberg individually answered to the complaint, and raised constitutional defenses, including the defenses that the complaint included allegations of protected speech activity and that the statutory oath and standards being applied against them were unconstitutionally vague and overbroad, on their face and as applied. (App. 28, 34.) By order dated December 20, 1968, the Wisconsin Supreme Court appointed Honorable Herbert Bunde as referee to try the factual issues of the case, and reserved to itself determination of all legal questions raised in the case. (App. 41.)

On January 15, 1969, the defense filed with the Wisconsin Court a motion for relief on legal issues raised in the case, including issues raised under the First Amendment to the United States Constitution, together with motions for change of trial referee, discovery and separate trials. (App. 46, 58, 59.) By order dated March 7, 1969, the Court appointed a new trial referee, George Young, former Dean of the University of Wisconsin Law School. All other of the defense motions were denied without opinion. (App. 83.)

Seeking guidance on the constitutional issues raised in this case, on March 17, 1969, the Eisenbergs commenced a declaratory judgment action in the United States District Court for the Western District of Wisconsin. In their complaint they sought a judgment declaring the standards of "disrespect" and "unprofessional conduct" set forth at sec. 256.29, WIS. STAT., and being applied against them by the State, to be unconstitutionally vague and overbroad, on their face and as applied, and declaring the complaint pending against them in the State proceedings, which was applying those standards to speech activity characterized as "conduct", also to be unconstitutionally vague and overbroad. A three-judge court was empaneled to hear the matter. On August 6, 1969, the Court held the statute was saved from unconstitutionality by reason of the narrow construction given it in *In re Cannon,* 206 Wis. at 406-408, 240 N.W. 441, wherein the Wisconsin Supreme Court had held that speech activity may not serve as basis for a charge of "disrespect". *Eisenberg v. Boardman,* 302 F. Supp. 1360, 1364 (W.D. Wis. 1969). With respect to the complaint the Court said:

> "If the complaint in the disciplinary proceeding alleged only that the Eisenbergs publicly charged Judge Krueger with a criminal offense, predicted he would resign to avoid prosecution, and solicited people to come forward with information aaginst Judge Krueger, we assume that a demurrer would have been sustained on the authority of *Cannon.*" *Eisenberg v. Boardman,* 302 F. Supp. at 1364.

However, the Federal Court believed the complaint could also be read to allege the Eisenbergs had committed acts of extortion, which conduct would not be constitutionally protected, and it held the complaint, therefore, to be constitutional. *Eisenberg v. Boardman,* 302 F. Supp. at 1365.

In the meantime, the trial before the referee appointed by the Wisconsin Supreme Court had been commenced on May 26, 1969. On July 31, 1969, the State rested its case. At this time the trial referee found there was no causal relationship established between any word or conduct of either Esienberg and Judge Krueger's mental illness and suicide, and that neither Eisenberg had committed any act of extortion. (App. 101-102.) The trial referee therefore certified a question to the Wisconsin Court:

> "Because of the above findings of fact the referee is of the opinion that the only conduct for which the defendants may be disciplined is speech activity which might be deemed unprofessional or in violation of the attorney's oath. Because of this fact, it is essential in the opinion of the referee that there be some legal determination made as to what speech activity is considered protected by the United States Constitution and Wisconsin Constitution, and what activity is unprotected. The resolution of this question is not only essential to the referee, but is essential to the defendants who are now required to present their defense. It is essential that there be guidelines set showing what they may be disciplined for in order that they may prepare their defense. The defendants in their individual answers raise the defense that all of their conduct is protected. In its appointment the Wisconsin Supreme Court reserved this legal question to itself. It is the opinion of the referee that this question is now ripe for determination, and for that reason the referee is certifying the following question to the Wisconsin Supreme Court:
>
> > What are the limits of punishable conduct in the light of the United States and the Wisconsin Constitutions securing the right of individuals to fully express themselves." (App. 103.)

By order dated August 5, 1969, the Wisconsin Court denied, without opinion, the requested guidance and ordered the trial to proceed. (App. 109.)

The trial was concluded on August 20, 1969. On March 12, 1970, after hearing extensive oral argument and having considered the voluminous complete trial transcript and the substantial briefs filed by the State and the defense, the trial referee entered his final determination that the State had failed to prove its charges against Sydney and Alan Eisenberg. (App. 153.) On March 17 and April 6, 1970, the defense filed with the Wisconsin Supreme Court motions to dismiss the complaints against the Eisenbergs. (App. 156, 158.) On March 30, 1970, the State filed a motion for judgment against the Eisenbergs, asserting that "the charges in the complaint herein are proven and true". (App. 157.) By order dated April 13, 1970, the Wisconsin Court denied the defense motion. (App. 164.)

On November 3, 1970, the Wisconsin Supreme Court entered judgment against Sydney and Alan Eisenberg, finding them guilty of "irresponsible and unprofessional conduct". *State v. Eisenberg,* 48 Wis. (2d) 364, 382, 180 N.W. (2d) 529 (1970). In support of its judgment the Court made the six findings discussed at length above. In its opinion the Wisconsin Court made only one reference to *In re Cannon,* 206 Wis. 374, 240 N.W. 441, and this was to declare the defense contention that the standards applied against the Eisenbergs were unconstitutionally vague and overbroad to be without merit, on the ground that that decision had limited the scope of their application in a manner consistent with constitutional requirements. *State v. Eisenberg,* 48 Wis. (2d) at 380, 180 N.W. (2d) 529. The Court did not further discuss the defense contention or that decision, nor analyze that decision's application to this case. The Wisconsin Court made no reference whatsoever to the decision of the United States District Court in *Eisenberg v. Boardman,* 302 F. Supp. 1360.

On November 4, 1970, the defense filed a timely motion for rehearing with the Wisconsin Supreme Court. (App. 226.)

In support of this motion it filed a brief in which it once more set forth the critical constitutional issues raised in this case. In response to this brief the State filed a brief opposing the motion for rehearing. In its brief the State, for the first time before the Wisconsin Court, addressed itself to *In re Cannon,* 206 Wis. 374, 240 N.W. 441, and cited that decision as supporting the State's theory of its case against the Eisenbergs, as follows:

> "The conclusion is inescapable that if the court had found that Mr. Cannon had (as in the instant case) publicly charged a sitting judge with conduct for which a criminal warrant could issue, or that he had predicted the judge would resign for personal reasons rather than face prosecution, or had solicited complaints against a judge by newspaper advertisements, such conduct would have been considered unprofessional and of such a character as to preclude readmission to the Bar." Plaintiff's Brief in Opposition to Defendants' Motion for Rehearing at 3.

This contention is directly contrary to the ruling of the three-judge Federal Court in *Eisenberg v. Boardman,* 302 F. Supp. at 1364. By order dated January 5, 1971, the rehearing motion was denied by the Wisconsin Court, without opinion. (App. 235.)

It is clear from the foregoing that unconstitutionally vague and overbroad standards have been applied against the Eisenbergs in this case. And those standards—of "unprofessional" conduct and "disrespect", have been applied to punish them for engaging in protected speech activity.

The Constitutional rationale for the result in the Wisconsin Court herein does not clearly emerge from its opinion, but it does appear that though reference is made to *In re Cannon,* 206 Wis. 374, 240 N.W. 441, as providing the constitutionally required limiting construction of those standards, the Wisconsin Court has adopted the construction of those standards pressed in this case by the State officers responsible for administering and enforcing those standards, and has, in effect, overruled that decision and applied those standards in the broadest terms. The subsequent action of the Wisconsin Court herein is irreconcilable with the holding of the three-judge United States District Court, which relied on *Cannon,* to sustain the challenged statute. With *Cannon* now, in effect, overruled, the standards applied in this case are, on their face, see, e.g., *Giaccio v. Pennsylvania,* 382 U.S. 399, 404 (1966); *Baggett v. Bullitt,* 377 U.S. 360, 371 (1964), as construed, and as applied, unconstitutionally vague and overbroad, and their existence and application works a "chilling" effect on the exercise by licensed attorneys of fundamental rights secured under the United States Constitution.

III. WHERE, FOLLOWING AN EXTENSIVE, FULL AND COMPLETE TRIAL, WHEREIN CREDIBILITY WAS OF CONTROLLING SIGNIFICANCE, BEFORE THE TRIAL REFEREE WHO FOUND THAT KEY STATE WITNESSES WERE UNTRUTHFUL AND THAT THE EISENBERGS WERE NOT GUILTY OF THE FACTUAL ALLEGATIONS AND CHARGES PRESSED BY THE STATE, THE WISCONSIN COURT ENGAGED IN A "DE NOVO REVIEW OF THE EVIDENCE" OR "TRIAL DE NOVO" BASED ON THE SAME CHARGES AND, COMPLETELY OVERTURNING THE TRIAL REFEREE'S FACTUAL FINDINGS, ENTERED JUDGMENT AGAINST THE EISENBERGS, THE RIGHTS OF SYDNEY AND ALAN EISENBERG, SECURED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, NOT TO BE TWICE PLACED IN JEOPARDY

OF A PROSECUTION BASED ON THE SAME CHARGES, WERE DENIED.

Sydney and Alan Eisenberg have in this case been required to twice defend themselves against charges brought by the State. They have been placed twice in jeopardy of those charges, in proceedings which the Supreme Court of the United States has characterized as "quasi-criminal". *In re Ruffalo,* 390 U.S. 544, 551 (1968).

The trial before the referee extended over a nine-week period, consumed 31 days of hearings, and was throughout its duration conducted wholly as an adversary proceeding. The transcript of this trial consists of over 4,000 pages. The referee, Dean George Young, presided during the entire trial and he heard all of the many witnesses who appeared, and he observed their demeanor and reaction to both direct and cross-examination and he had opportunity to weigh their testimony and credibility. As the trial progressed, credibility became of decisive significance. Following conclusion of the evidenciary hearings the referee heard five hours of oral argument of the facts by counsel for both sides, and he was presented with almost 200 pages of written factual argument, in two briefs by the State and one by the defense. After considering for two months the full unabridged transcript and the oral and written arguments presented to him, the referee set forth his findings in a 35-page opinion, in which he discussed at length the factual arguments and analysis made by both sides, and he found that two key State witnesses had not told the truth, and he found that the State had failed to prove the charges it made against the Eisenbergs. (App. 153.) The referee's determination was dated March 12, 1970.

On March 17, and again on April 6, 1970, the defense filed motions with the Wisconsin Supreme Court for judgment dismissing the complaints against the Eisenbergs. (App. 156, 158.) The second motion was supported by an affidavit. (App. 159.) Asserting that "the charges in the complaint herein are proven and true", the State filed a motion for judgment against the Eisenbergs on March 30, 1970. (App. 157.) The defense made its motions on the grounds that the referee, after an extensive and full trial, had found the Eisenbergs innocent of the charges leveled against them; that the State's motion for judgment called for a retrial of the very factual issues already tried, considered and determined by the referee; that the Court, as an appellate court, was not structured to hear evidenciary trials; and that to try the factual issues again would violate the Eisenbergs' rights, secured under the Fifth Amendment to the United States Constitution, not to be twice placed in jeopardy of the same State initiated charges. (App. 159-163.) By order dated April 13, 1970, the Wisconsin Court denied the motion to dismiss the complaints. (App. 164.) At this time counsel for the State, and later the Court itself in its opinion dated November 3, 1970, characterized the Court's retrial of the factual issues as a "de novo" review of the evidence or "trial de novo". *State v. Eisenberg,* 48 Wis. (2d) 364, 371, 180 N.W. (2d) 529 (1970).

After requiring them again to defend themselves against the charges which the trial referee found had not been established by the State, and having accorded the State a second chance to litigate those charges, upon conclusion of its "de novo" review the Wisconsin Court entered judgment on those charges against Sydney and Alan Eisenberg. This de novo appellate structured review of factual issues which had been resolved in their favor by the trial referee, and which raised credibility questions of controlling significance, denied Sydney and Alan Eisenbergs' rights secured under the Fifth Amendment, and to due process, to be free from repeated prosecutions on the same charges.

IV. BY REASON OF THEIR BEING PROSECUTED UNDER AN UNCONSTITUTIONALLY VAGUE AND OVERBROAD STANDARD OF CONDUCT, BY REASON OF THEIR BEING DENIED FAIR NOTICE OF WHAT IT WAS THEY WERE SPECIFICALLY CHARGED WITH THAT THE STATE CONSIDERED TO BE PUNISHABLE, AND BY REASON OF THE TOTALITY OF STATE ACTION IN THIS CASE, SYDNEY AND ALAN EISENBERG WERE DENIED A FAIR TRIAL AND THEIR RIGHTS TO PROCEDURAL DUE PROCESS OF LAW, SECURED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WERE DENIED.

A. *Background.*

Following Judge Krueger's suicide on Wednesday morning, August 28, 1968, the Milwaukee press blamed the Eisenbergs. The Thursday Sentinel retold the story of Krueger being forced to appoint the Eisenbergs to the advisory committee and also reported that Krueger had been guilty of a personal indiscretion which, the story related, Krueger said the Eisenbergs found out about and in effect used to force him to appoint them to the committee. (App. 24, 58.) The Sentinel story did not disclose Krueger's highly irrational behavior, nor his irrational basis for believing the Eisenbergs knew of his personal indiscretion. Thereafter, both the Sentinel and the Journal published editorials demanding an investigation into the circumstances of Krueger's death, including demands that the State Bar investigate.

As a result of the publicity generated by the Milwaukee newspapers the Eisenbergs became the scorn of Milwaukee and of Wisconsin. People believed they had squeezed a man until he had killed himself. The Eisenbergs were believed to be extortioners and murderers. They received horrible hate calls and letters. Physical violence was inflicted on their office. (Tr. 2760-2765.) The State's very investigation began as a result of the newspaper stories and editorials. And when the State proceedings culminated in the Wisconsin Court's overturning of the trial referee's findings and its entry of judgment against the Eisenbergs, the same newspapers published editorials congratulating the Court for what it had done. (App. 229.) Thus, a massive, misleading news coverage convicted the Eisenbergs from the outset, demanded their punishment, and congratulated the State when this had been achieved.

The effects of the newspapers' involvement never dropped out of the case and their prejudicial impact on the course of the State proceedings and on the rights of Sydney and Alan Eisenberg never dissipated. The news coverage which triggered and from the outset accompanied this case created a presumption in peoples' minds that the charges made against the Eisenbergs by the newspapers were true. And when those charges were adopted and pressed against the Eisenbergs by the State, this presumption became a conclusion and the news coverage blinded even responsible men to the possibility that Sydney and Alan might be innocent, and to the requirement that they be accorded a dispassionate and fair trial.

B. *The notice requirements of constitutionally secured procedural due process of law were contravened by the application against the Eisenbergs in this case of impermissibly vague and broad standards of conduct.*

With people believing Sydney and Alan Eisenberg to be extortioners and murderers, precision and clarity were surely required of any charges brought by the State. Yet the responsible State officials chose to apply against the Eisenbergs the standards set forth at sec. 256.29, WIS. STAT., and the accused were charged with "disrespect" and "unprofessional conduct". These standards, here applied where fairness required clarity of the charges and where protected speech activity was clearly involved, are on their face, and as construed and applied by the Wisconsin Court, unconstitutionally vague and overbroad.

A standard of conduct that is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application", or a standard that "sweeps within its broad scope activities that are constitutionally protected free speech" as well as those which are not protected, a standard that does not give fair notice of what conduct is proscribed, offends the notice requirements of procedural due process of law and may not constitutionally serve as basis for punishment of an individual under our system. See, e.g., *Whitehill v. Elkins,* 389 U.S. 54, 58-59 (1967); *Cox v. Louisiana,* 379 U.S. 536, 552 (1965); *Baggett v. Bullitt,* 377 U.S. 360, 367 (1964); *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926). When such a standard is applied, it is tested by its "possible applications", and not by whether the individual against whom it is applied has or has not engaged in protected activity. See, e.g., *NAACP v. Button,* 371 U.S. 415, 432 (1963).

The standards applied against Sydney and Alan Eisenberg in this case are clearly such vague and overbroad standards. The terms "unprofessional conduct" and "disrespect" are broad and vague and difficult, if not impossible, to understand in terms of specific conduct. See, e.g., *Giaccio v. Pennsylvania,* 382 U.S. 399, 404 (1966); *Baggett v. Bullitt,* 377 U.S. at 371. They in no way identify what it is that must be defended against. Their application in this case has not only been unconstitutional from the beginning but has also served to prejudice and hamper the defense throughout the State proceedings and to deny the Eisenbergs a fair trial.

C. *The State's complaint in this case failed completely to meet the notice requirements of due process of law and it violated the constitutionally secured rights of the Eisenbergs to a fair notice of what they had done the State considered to be punishable.*

When the State's complaint was filed it was filed against an emotionally charged background of public prejudice and hatred against the Eisenbergs. People believed Sydney and Alan Eisenberg to be guilty of extortion and of having caused a man to kill himself. The Eisenbergs know that acts of extortion and causing a man's death, even though they involve speech activity, are not constitutionally protected, and if Sydney and Alan Eisenberg were guilty of such criminal acts they could be punished. But Sydney and Alan Eisenberg were neither guilty of extortion nor responsible for Judge Krueger's death. The John Doe magistrate had determined that no crime had been committed in connection with Krueger's death. (App. 24-26.) And subsequently the trial referee twice found that neither Eisenberg was guilty of extortion or responsible for Krueger's death (App. 101-102, 148-149, 153), and the Wisconsin Court in its final opinion set forth no finding that either Eisenberg was guilty of extortion and it said that the allegations suggesting the Eisenbergs caused Krueger's death were irrelevant, *State v. Eisenberg,* 48 Wis. (2d) 364, 380, 180 N.W. (2d) 529 (1970).

The complaint itself did not expressly charge Sydney and Alan with either extortion or with causing Krueger's death. Instead it was replete with allegations of speech activity said to have been engaged in by them. It charged them with being guilty of "disrespect" and "unprofessional conduct". Only by innuendo did it charge them with extortion and murder, by setting forth the broad, conclusory and highly prejudicial allegations—first published in the Milwaukee newspapers, that Alan and Sydney Eisenberg had "pursued a course of vindictive and reckless harassment and psychological persecution against Judge Krueger"; that this "conduct" was "of such an aggravated nature as to cause Judge Krueger great mental suffering and anguish, which culminated in his death by his own hand"; and that they had "forced" Judge Krueger to do their bidding.

By reason of such allegations the complaint failed completely to inform the Eisenbergs of what it was they had done, other than engaging in protected speech activity, that the State considered to be punishable. For it was only implicitly, by innuendo, that the complaint raised the specter that was to haunt them and prejudice their rights throughout and until the very end of the State proceedings—the charge that Sydney and Alan Eisenberg had squeezed a man to the point where he killed himself.

When attempts to seek clarification of the charges from the Wisconsin court proved unsuccessful and the defense challenged the constitutionality of the complaint by commencement of an action in the United States District Court, on the grounds the complaint included allegations of protected speech activity, the three-judge panel upheld the complaint because it was broad enough to include a charge of extortion. *Eisenberg v. Boardman,* 302 F. Supp. 1360, 1365 (W.D. Wis. 1969). Yet, with the complaint thereby saved, at no time thereafter during the State proceedings did the State even charge or attempt to prove the Eisenbergs to be guilty of extortion, but throughout it only referred to the specific activities involved in placing newspaper advertisements, and the activities relating to predictions of Krueger's resignation and issuance of a criminal warrant. The State thus had the benefit of a complaint saved from being unconstitutional only because it was broad enough to comprehend a charge of extortion, a charge the State was not prepared to prove and which it did not attempt to prove. And under this complaint the State proceeded to press the allegations relating to clear speech activities.

Because of this the defense throughout the State proceedings faced the continuing dilemma of not knowing whether it was called on by the complaint to defend against a charge of extortion, or only against charges concerning clearly protected speech activities, or some other charge. Thus, the complaint gave no notice as to what it was the Eisenbergs had done that was considered by the State to be punishable, and the Eisenbergs were thereby denied a fair trial.

D. *State action throughout this case has frustrated the Eisenbergs' attempts to clarify what it was they had done that was considered to be punishable, and their rights to fair and specific notice of what charges they must defend against and their rights to a fair trial were denied.*

After the complaint was filed the Eisenbergs applied to the Wisconsin Court for a transcript of the Bar Commission's investigation, so that they might know the bases of the allegations made against them and what it was they had done that was considered to be punishable. (App. 13.) This application was denied by the court on the very day it was filed. (App. 14.)

Again, prior to commencement of the trial, in November, 1968, the defense made motion to the Wisconsin Court to strike from the complaint the allegation that the Eisenbergs had caused Judge Krueger's death. (App. 15.) The State opposed the motion even though it was not prepared to offer and never did offer any proof to establish this charge. The defense, at the same time, also demurred to the complaint because the only specific allegations made therein concerned speech activity, which had on prior occasion been held to be not punishable in *In Re Cannon,* 206 Wis. 374, 240 N.W. 441 (1932). And the defense moved to dismiss the complaint. (App. 18.) These motions and demurrer were, on December 4, 1968, denied without opinion, and without clarification as to what it was that Alan and Sydney Eisenberg had done that was considered by the State to be punishable. And the complaint continued to contain the inflammatory and prejudicial allegations suggesting that the Eisenbergs had caused Judge Krueger to kill himself. (App. 27.)

And in January, 1969, again prior to commencement of the trial, the defense once more moved the Wisconsin Court for relief on the legal issues raised in the case, including issues raised under the First Amendment, and including the allegations suggesting the Eisenbergs were responsible for Krueger's death, which allegation the defense pointed out were highly prejudicial and inflammatory, impossible of proof, and would unduly complicate and prolong the trial, and were irrelevant. (App. 46.) Affidavits (App. 47) and an extensive memorandum of authorities were filed by the defense with the Court. The State refused to oppose this motion on its merits, but only accused the defense of delay. And on March 7, 1969, the motion was denied by the Wisconsin Court without opinion, and without any guidance or clarification being accorded as to what it was the Eisenbergs had done that was considered punishable by the State, or as to what speech activity, if any, concerning a judicial officer, might be considered punishable, and without any relief being accorded from the prejudice worked by the allegation that suggested the Eisenbergs were guilty of having caused Krueger's death.

The trial before the referee commenced on May 26, 1969. The State again failed to give notice as to what conduct by the Eisenbergs it considered punishable. Counsel for the State made no opening statement and would not inform the defense of his theory of the case. (Tr. 4.) And throughout this trial the State's theory, as to what it was for which the Eisenbergs could be punished, changed. (Tr. 2613, 2619.) Also during the trial the State continually introduced evidence of pure speech activity, not included in the complaint, allegedly engaged in by Alan and Sydney Eisenberg, although there was no evidence that reports of such activities had ever gotten back to Judge Krueger. When questioned by the defense, the State consistently refused to indicate whether this activity was considered to be a separate basis for punishment, or whether evidence of it was offered for some other purpose. On July 31, 1969, the State concluded its case, and the defense made motion to strike the allegation that the Eisenbergs had caused Judge Krueger's death, on the grounds the State had failed to produce evidence to support this allegation. At this time counsel for the State said that this allegation did not really say the Eisenbergs had caused the Judge's death, but later he said he thought it was included to show "the seriousness of the situation". (Tr. 2549.) Also at this time the defense, in order to apprise itself of what it had to defend against, attempted to define the questions, both by asking counsel for the State, and by making motion for findings by the Referee. (Tr. 2460-2472.) Counsel for the State refused to identify what conduct was considered punishable. (Tr. 2601-2624.)

In response to the defense motion the trial Referee made findings on August 4, 1969, that there was no causal relationship between any speech or conduct by the Eisenbergs and either the mental illness of Judge Krueger or his death. (App. 101-102.) The Referee also found the State had not produced evidence to establish that either Sydney or Alan Eisenberg had committed any act of extortion. (App. 102.) And in order that he might be advised as to what conduct it was for which the Eisenbergs could be punished, and in order to permit the defense to know what it was it must defend against, and despite the fact that counsel for the State charged that if he did so he was avoiding his responsibility (Tr. 2593), the referee also certified two legal questions to the Wisconsin Court:

> "What are the limits of punishable conduct in the light of the United States and the Wisconsin Constitutions securing the rights of individuals to fully express themselves." (App. 103.)
>
> "Can activities not covered in the complaint be considered a basis for the imposition of discipline. If so, what procedural limitations or safeguards must be imposed to assure defendants due process." (App. 103.)

On August 5, 1969, the Wisconsin Court refused without opinion or clarification to answer the questions certified. Instead it ordered the trial to be resumed. (App. 109.)

Upon resumption of the trial the defense again asked what conduct the State considered to be punishable. At this time the defense was categorically advised by the State that the prosecution did not consider itself to be bound by any previous findings of the trial referee, and that if the defense proceeded and failed to address itself to anything in the case because of a prior finding by the referee it would do so at its peril. Counsel for the State said: "If you feel there is anything in this record that requires a defense, then on that part you should offer it at this time." (Tr. 2614.)

Finally, after nine weeks of trial, during which he was able to observe the demeanor and reactions of the many witnesses who appeared before him, and to weigh their testimony and credibility, and after hearing both sides orally argue the facts for five hours, and after considering and studying for several months the transcript and almost 200 pages of written factual argument presented to him in briefs by both the State and the defense, the trial referee, who is an experienced and highly reputed legal scholar, made his findings in a 35-page opinion, in which he discussed at length the factual arguments made by both the State and the defense, and found that the State had failed to prove the charges it had made against Sydney Eisenberg and Alan Eisenberg. (App. 153.) The referee so concluded, even though the defendants had been disadvantaged by lack of fair notice of what specifically they were required to defend against.

At this time the defense moved to dismiss the complaint, pointing out, among other things, that further trial of this case would put Sydney and Alan Eisenberg twice in jeopardy (App. 156, 158, 159-163) for the trial referee had found them to be not guilty of the charges made against them. But again the State opposed this motion, and contrary to the considered and clear findings of the referee asserted that its charges had been proved (App. 157), and the motion was denied (App. 164). The Wisconsin Supreme Court held, in effect, that it would accord the State a trial de novo in this case.

Granted the trial de novo, before the Wisconsin Supreme Court, the State proceeded to add to its charges against the Eisenbergs matters totally outside the scope of the complaint, matters which were prejudicial and which were pressed as a basis for punishment. For example, in its briefs to the Court the State charged Alan Eisenberg with false swearing because his testimony contradicted that of two witnesses for the State; it charged that Alan Eisenberg should be punished because before the referee he made comments sharply critical of counsel for the State; and it charged Sydney Eisenberg, as a parent, with responsibility for any wrongful acts his son Alan might be guilty of—despite the fact that early in the proceedings the State had said no conspiracy was alleged, and despite the fact that the Wisconsin Court had joined the trials of father and son for the sole reason it was more convenient to the State to do so, rather than to have separate trials as requested by the defense. And again the defense was put in the position of not knowing what charges it was required to address.

Assuming application of a proper conduct standard, individuals who are faced with injury at the hands of government—including attorneys who are faced with exclusion from their profession, must also be accorded fair notice of the specific reasons why government would act against them in the particular case, and a fair opportunity to contest those reasons. These too are requirements of constitutionally secured procedural due process. E.g., *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102, 105 (1963); see *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957). Consistent with these requirements an attorney may not be punished for reasons based on evidence adduced at trial, of which he was not given notice until after trial was commenced. *In re Ruffalo,* 390 U.S. 544, 551 (1968).

The complaint in this case wholly failed to identify what specifically it was that Sydney and Alan Eisenberg had done that the State considered to be punishable. Moreover, the State repeatedly added to the dilemma faced by the defense when it produced evidence and made arguments concerning activities allegedly engaged in by the Eisenbergs, which activities were not set forth in the complaint. Throughout the State proceedings the Eisenbergs were thereby denied fair notice of what charges they were required to defend against, and their constitutionally secured rights to a fair trial were denied.

E. *By an accumulation of State action throughout this case the Eisenbergs have been denied a dispassionate and fair trial and their constitutionally secured rights to procedural due process of law.*

In this case there was throughout the State proceedings a course of conduct followed by the State, which conduct in its totality denied Sydney and Alan Eisenberg a dispassionate and fair trial. This course of State conduct demonstrated a most low regard for any possibility that the Eisenbergs might be innocent of the charges against them, which charges were first pushed by the newspapers and later adopted by the State itself.

Even during the investigatory stages of this case the newspaper involvement affected the actions of State officials and the rights of the Eisenbergs. During the State Bar's investigation of the newspaper charges, notwithstanding a clear conflict of interest between the Milwaukee press and the Eisenbergs, the Bar Commission permitted each news witness who appeared to be accompanied by the attorney for and supplied by the Journal Company

—the owner of both the Milwaukee Journal and the Milwaukee Sentinel, but neither Sydney nor Alan Eisenberg was present. (Tr. 23, 3279.) And notwithstanding this conflict the chairman of the Bar Commission, Wade Boardman, continued to preside, even though he was the regular counsel for the Wisconsin Newspaper League of which the two largest newspapers were the Sentinel and Journal.

When the Eisenbergs were finally permitted to appear before the Bar Commission, they weren't told with any specificity as to what they should speak about. The only guideline given them was that the investigation related to what was in the newspapers. They were permitted to speak at random. They were not told what matters the Commissioners deemed material. (Tr. 23.) They left believing they could provide additional information which would be considered. (Tr. 23-24.) Although such information was sent the next day, by the time it was to arrive in the usual course of the mails the complaint against them was already being circulated for signature by the Bar Commissioners. (Tr. 24.)

Further, the State representatives responsible for the investigation never bothered to question or speak with Sentinel editor Harvey Schwander. (Tr. 1535-1536.) Schwander was responsible for the newspaper attack on the Eisenbergs. His testimony establishes how baseless in fact the charges against the Eisenbergs were. His testimony demonstrates the motive for all the newsmen who testified. His testimony established Judge Krueger's mental illness. The state investigators never spoke to Alyce Neff. (Tr. 3366.) Nor did they even bother to look at her office building, to observe the physical characteristics of where it was the Eisenbergs were supposed to have been spying. They never observed that the glass alongside the doors to her office could not be seen through, nor that the keyhole was in a Yale lock, and that her third floor office could not be observed from the street. (Tr. 3366-3367.) The investigators never spoke to June Fell. They concluded Sydney was responsible for the press release without even speaking to the girl who took the press release in shorthand. (Tr. 2920-2923.) The investigators believed Mieritz when he said Sydney said he would get Krueger. They never even spoke to Mike Burtak, a witness to the conversation, who together with Sydney disagreed with Mieritz's story. (Tr. 3376-3379.)

Finally, of demonstrated prejudice to the Eisenbergs was the charge, made without any meaningful enquiry, that they in effect caused Krueger to kill himself. This charge was made without any investigation whatsoever into Krueger's medical or psychiatric background. In a matter of such great importance, and involving such a complex matter as human behavior, responsible and unbiased decision makers ought not and could not rationally draw such a conclusion without thorough enquiry and expert advice. Yet the State pressed its charge without making any such enquiry, and it was only at the trial of the Eisenbergs that such enquiry was finally made, but not by the State. Doctor Leigh Roberts, a defense witness and a psychiatrist, who had studied the evidence of Krueger's behavior during the days and even years prior to his death, characterized Krueger's belief that the Eisenbergs knew of any relationship he may have had with Alyce Neff as a delusion, a product of his mental illness. And it became clear there was every reason to believe that Krueger's belief he had sexual intercourse with Alyce Neff was itself a delusion. (App. 143.)

After the complaint was filed, the bias against Sydney and Alan Eisenberg demonstrated during the investigation was carried over and repeatedly demonstrated by State actions throughout the course of the proceedings. The frustration and unfairness worked by application of a vague and overbroad conduct standard, by a prosecution pressed under an ambiguous complaint that made its most serious charges only by innuendo, and by consistent denials of defense attempts to clarify the charges, have already been discussed. Their unfairness was but part of the total pattern of State conduct against the Eisenbergs throughout this case, which conduct can only be explained by a conclusion that responsible men presumed from the beginning that the newspaper stories were true and the Eisenbergs guilty.

When, after the complaint was filed, the Eisenbergs applied to the Wisconsin Court for a transcript of the Bar Commission's investigation, so that they might know the bases and understand the nature of the allegations made against them, their application was denied on the very day it was filed. (App. 13, 14.) The same transcript, however, was made available by the State to the attorney for the Milwaukee newspapers.

In January, 1969, the defense again moved for discovery (App. 46), informng the Court that people who appeared to possess information material to the case refused to speak with either the Eisenbergs or their attorneys. Supporting affidavits and an extensive memorandum of authorities were filed with the court by the defense. The State did not oppose this motion on its merits but only accused the defense of delay. And although the proceedings were expressly denomonated "civil" in sec. 256.28(12), WIS. STAT., the Court denied this motion for discovery, and thereafter during the trial the State relied on those people who would not speak with the defense for 80 per cent of its evidence against the Eisenbergs.

In January, 1969, when the defense filed an affidavit of prejudice and moved for a change of referee, this motion was also denied, summarily, even though sec. 256.28(11), WIS. STAT., expressly provided for just such a motion. Later the Wisconsin Court did grant the motion when it was made again by the defense, and this was the first and last time that any motion made by the defense was granted by the Wisconsin Court, during the entire two year course of the State proceedings.

After Sydney and Alan Eisenberg had answered to the complaint they moved for separate trials, because they were father and son and feared the emotional strain of having to face together the heinous allegations suggesting they had squeezed Judge Krueger until he killed himself. (App. 58, 59.) For difficult as it would be for anyone to face such allegations, it would be much more terrible to have to hear the same charges being pressed also against a loved one. The state at this time said it was not alleging any conspiracy and that, in fact, the allegations made against the Eisenbergs were separate and distinct with respect to each of the accused. Yet the State opposed the motion for separate trials on the grounds it was more convenient to the State to have a single trial, and the motion was denied. (App. 83.) And the trial record is filled with incidents where father and son emotionally rose to the defense of each other, because of accusations, in fact or presumed, made by the prosecution against one or the other of the co-defendants. And the emotional trauma and confusion caused by Sydney and Alan Eisenberg being tried together hampered the defense throughout the proceedings and denied a fair trial.

Later, after the trial referee; despite all obstacles, had found both father and son to be not guilty of the State charges, and when the Wisconsin Court had accorded the State a second chance to prosecute its charges, the State argued in its briefs new matters, that Sydney Eisenberg was guilty of having failed to properly control the actions of his son Alan, and, in effect, a conspiracy was thereby alleged. And, when the Wisconsin Court rendered its opinion it found only that Sydney had signed business checks to pay for newspaper advertisements, which included among many others the advertisements concerning Krueger. Yet the court made no attempt to distinguish what it was that Sydney had done from what Alan had done when it found both Eisenbergs to have forced Krueger to do their bidding and to be guilty of "disrespect" and "unprofessional conduct". The State action in trying a father and son together under the circumstances of this case, and in saying there was no conspiracy allegation, yet making arguments and findings with respect to the accused that must depend on some conspiracy theory, did great prejudice to the emotions and to the rights of the Eisenbergs to a fair trial.

The unfairness toward the Eisenbergs occasioned when the Wisconsin Court granted the State a second chance to prosecute its charges has already been discussed. Furthermore, the "trial de novo" was had, not by the procedures associated with a fact-finding trial, but by appellate procedures. The Wisconsin Court did not see nor hear any witnesses, and it heard but 45 minutes of both factual and legal arguments by the defense, and it limited the defense to a written brief of only 80 pages in which to argue both the extensive factual and the critical legal issues, including issues relating to the constitutionally secured right to freedom of speech and expression. And for the Court's consideration the State abridged the transcript to a record of only 150 double-spaced, letter-sized, typewritten pages, and although the defense submitted its own abridgement of over 550 pages, this was still only a pale shadow of the over 4,000 pages of the transcript considered by the trial referee. In trial of an issue of fact, as distinguished from an issue of law, counsel is generally expected to play a dominant role in presenting and arguing facts, but in this new trial, in a case where facts are extremely important, counsel played only the circumscribed roles allotted to counsel in an appellate proceeding, and the defense was denied full and fair opportunity to litigate the facts in the trial de novo before the Wisconsin Court.

On November 3, 1970, the Wisconsin Supreme Court entered its decision and judgment, totally revising the findings of the referee to find Sydney and Alan Eisenberg guilty as charged by the State. *State v. Eisenberg,* 48 Wis. (2d) 364, 180 N.W. (2d) 529. In its opinion the Court recited the evidence relied on by the State, including the testimony of the State witnesses the referee found not to be reliable, and the court apparently resolved all questions of credibility against the defense—but made no mention of the evidence relied on by the defense. But in resolving such questions of credibility against the defense the Court offered no explanation for doing so; it did not explain its reasons for overturning the trial referee's findings regarding credibility, despite the importance of the credibility question and the fact that it was the trial referee who saw and heard the witnesses, and not the appellate court.

And the Court had before it an affidavit wherein Michael Bressette, a witness for the State, confessed that at the request of the State's key witness, Cameron, he had perjured himself when he testified for the State. (App. 188.) In adjudging the Eisenbergs guilty the Court relied heavily on the testimony of Cameron, which the trial referee had found not credible. Yet the Court made no mention of the Bressette affidavit, and it made no attempt to meet the issues raised in this affidavit.

The Wisconsin Court's judgment was entered also without any mention of a motion pending before the Court to remand for the taking of the testimony of Assistant Racine County District Attorney Lawent, which, as set forth in his affidavit, was that over a month prior to appointing the Eisenbergs to the advisory committee Judge Krueger had discussed such appointment in open court. (App. 117.) This testimony, the State itself told the Court, was such that, if true, would render the charges against the Eisenbergs—that they forced Krueger to appoint them in August, to be without basis. The defense must assume that this motion too was denied, and the trial referee's factual findings overturned without an evidenciary hearing ever being conducted regarding the critical facts set forth in the Lawent affidavit.

Finally, in its opinion the Wisconsin Court said the allegations suggesting that the Eisenbergs were responsible for Krueger's death were irrelevant. The Court made this finding almost two years following the defense motion to strike these allegations because they were "irrelevant" and seriously prejudicial and that their litigation would unduly complicate and prolong the litigation. The Court made its finding only after those allegations had worked their prejudicial effect, and the trial had been complicated and prolonged, and the Eisenbergs had been clearly and completely exonerated of those charges. Yet, despite the effect those inflammatory and unnecessary charges had on prolonging the trial, the Court imposed against the defense the full costs of the proceedings, which costs were said to exceed $20,000.00.

The "rudiments of fair play" or "fundamental fairness" are generally said to be the essence of procedural due process of law. Indeed, our system of law has always endeavored to prevent even the probability of unfairness". *In Re Murchison,* 349 U.S. 133, 136, (1955). The reason for such concern is that procedural fairness is essential to the security of substantive rights. E.g., *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 179 (1951) (Douglas, J., concurring). Such concern assumes added dimension, and particular fairness is required, where the vital and sensitive freedoms of speech and expression are involved and at stake. See, e.g., *Speiser v. Randall,* 357 U.S. 513, 520-521 (1958). And the required fairness may be found denied not only by specific acts of government, but also by a "totality of circumstances". See, e.g., *Sheppard v. Maxwell,* 384 U.S. 333, 352 (1966). In this case the charges against Sydney and Alan Eisenberg were pressed against an emotionally charged background of aroused public hatred against them, and even though those charges clearly involved protected speech activity, the State engaged in a course of conduct throughout the proceedings which in its totality was grossly unfair and denied the Eisenbergs a fair opportunity to contest and defend against the charges brought by the State, and denied their rights to constitutionally secured procedural due process.

V. WHEN THE WISCONSIN COURT ADJUDGED SYDNEY AND ALAN EISENBERG GUILTY OF "DISRESPECT", WHICH JUDGMENT IS BASED ON SIX FINDINGS OF FACT ALL OF WHICH CONCERN OR ARE BOTTOMED ON SPEECH ACTIVITY REGARDING AN ELECTED JUDGE, SAID JUDGMENT WAS CONTRARY TO THE COURT'S PRIOR DECISION IN *IN RE CANNON,* AND THE RIGHTS OF THE EISEN-

BERGS NOT TO BE SUBJECTED TO PROSECUTION UNDER AN EX POST FACTO LAW, SECURED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WERE DENIED.

When the Wisconsin Supreme Court entered its judgment that Sydney and Alan Eisenberg were guilty of having failed—in violation of sec. 256.29(1), WIS. STAT., to maintain "the respect due to courts of justice and judicial officers", and this judgment was based on findings of fact all of which involved speech activity allegedly engaged in by the Eisenbergs and regarding an elected county judge, said judgment was contrary to the earlier decision of the Court in *In re Cannon*, 206 Wis. 374, 409, 240 N.W. 441 (1932), wherein the Court had held that an attorney may not be punished for "disrespect" even though he engages in intemperate and unfounded criticism of the courts. Prior to the Wisconsin Court's entry of judgment in this case, the *Cannon* case was the law in Wisconsin and Sydney and Alan Eisenberg had a right to rely on the construction placed on sec. 256.29(1), WIS. STAT., in that decision as the standard by which the speech activity of licensed attorneys is to be judged. Now, as discussed more fully above, the Wisconsin Court has in this case in substance overruled *Cannon* and it has decreed punishment of the Eisenbergs for their engagement in speech activities not punishable under the standard announced in the *Cannon* decision. The effect of this is to deny to the Eisenbergs their rights, secured under the Fourteenth Amendment to the United States Constitution, not to be subjected to prosecution under an ex post facto law, or a new conduct standard which is announced only after the conduct has occurred on which a prosecution is based.

CONCLUSION

Two essential things are generally said to set our system of government apart from other systems. The first is that change concerning government is accomplished by the non-violent, although often sharp, expression of individual comment and opinion concerning government and government officials, and resort to this means and engaging in such activity is even looked on as a duty of the individual under our system. The second is that when an individual is brought into conflict with government he is treated fairly and dispassionately, and he is accorded full opportunity to contest with the government on fair terms. These things derive from our heritage and culture, and from a fundamental respect for the dignity and worth of the individual. They are enshrined under our system of government as constitutionally secured rights. And they are rights secured to all individuals under our system, regardless of who they may be, their occupation or profession, or the circumstances giving rise to their being brought into conflict with government.

In this case the power of government has been brought to bear on two individuals, a father and son, licensed attorneys in the State of Wisconsin, in an area involving important prerogatives of the Wisconsin Supreme Court, in which area that court's power has even been characterized, by the State, as being "plenary" in dimension. Yet even in such an area it is men who act. And experience teaches that even the most decent and honorable men, acting with the highest motives, may err. And when such men are government officials, and their error results in a failure to accord any individual the full measure of his dignity and constitutionally secured rights to speak and express himself freely regarding government and to be accorded fair treatment by government, then our system has failed to meet its most basic responsibilities.

It is respectfully submitted that Sydney and Alan Eisenberg have, in the State proceedings here, been punished for the constitutionally impermissible reason that they engaged in speech activity concerning an elected government official, and that throughout these proceedings the State has by specific actions and by an accumulation of actions denied to them that fair treatment which is required by constitutionally secured procedural due process of law. It is requested that the petition of Sydney and Alan Eisenberg for a writ of certiorari to the Wisconsin Supreme Court be granted and that this Court review this case and the fundamental constitutional questions herein involved.

Respectfully submitted,

RICHARD L. CATES
JOHN H. BOWERS
BRUCE F. EHLKE
LAWTON & CATES
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Petitioners